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ABSTRACT

As an aid to New Jersey school board members, administrators, and attorneys without extensive labor law training, this revised edition of a handbook on the New Jersey Employer-Employee Relations Act sets out school boards' basic obligations and rights under the law in light of changes brought about by recent agency and court cases. Its six chapters cover, first, the nature and responsibilities of the state's Public Employment Relations Commission (PERC); second, the types of employees that may bargain collectively and the procedures for union representation, recognition, certification, and elections; third, unfair practices by employers or employee organizations and the proper procedures for filing unfair practices charges; fourth, the legal scope of negotiations and the process for petitioning PERC to decide scope of negotiations problems; fifth, PERC's use of injunctions and restraining orders, especially in past cases involving unfair practices and scope of negotiations; and, sixth, procedures for settling bargaining impasses, including mediation, factfinding, and conciliation. An appendix provides the full text of New Jersey's Employer-Employee Relations Act. (RW)

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The Public Employment Relations Law

by Garry M. Whalen
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Foreword

The difficulty, and the challenge, of law is the fact that it is constantly changing, through agency and court decisions, and through legislative action.

This is particularly true about public sector labor law. Public employers and public employee unions have been involved in collective negotiations for a relatively short period of time, just eleven years compared to more than forty years in the private sector. During this era, everyone involved in public sector labor relations has been struggling to discover the exact requirements and limits of this new challenge. What is the proper scope of negotiations? What constitutes good faith bargaining? What are the rights of employers, unions, and individual employees under a negotiations law?

Three years ago, the first edition of *The Public Employment Relations Law* was published. Since then, the PERC law has gone through a dramatic series of agency and court cases culminating in the *Ridgefield Park* decision of last summer. To meet the needs of school boards and their representatives in the context of these changes, this new book is offered, in a substantially larger, more comprehensive format.

The intent of this book is not to make labor law experts out of its readers. Rather, we hope that a basic knowledge of the obligations and rights created by the PERC law will foster productive, cooperative labor relations in New Jersey school districts, so that boards, administrators and staff can concentrate on their primary responsibility—providing a thorough and efficient system of education for the children of this state.

Lloyd J. Newbaker
Executive Director

Introduction

For the purposes of this book, the following terms are used interchangeably to refer to the state statute governing public sector negotiations in New Jersey: the New Jersey Employer-Employee Relations Act; the PERC law; Chapter 123; C.123; Title 34:13A; and the Act. Public employees in New Jersey first received negotiations rights in 1968 under a law known as Chapter 303; references to C.303 refer to that statute, prior to its substantial revision by Chapter 123 in 1975.

This book is a revision of an identically titled volume first published in 1976. The structure and organization of this new book owe a great deal to that initial effort, and we acknowledge a debt to William Spenla and John Barbour for their contributions to that book. A special note of recognition is due Bruce Taylor who supervised and co-authored the first book, and who joins us in the production of this revised edition. We also thank Rita Stringer for her substantial contribution to the chapter on "Injunctive Relief."

This book, although completely rewritten and considerably more detailed than its predecessor, retains the goal of that volume—to serve as a primer for lay board members, school administrators, and attorneys without extensive training in labor law, as to the basic intent and application of the PERC law. It does not pretend to be a definitive text; the serious student of public sector labor law must go beyond this volume to the reams of case law developed by PERC and the state courts, to adequately comprehend the complexity of this statute.

Garry M. Whalen
Director of Labor Relations

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The Public Employment Relations Commission

The State agency responsible for enforcing the laws pertaining to New Jersey's public sector labor relations is the Public Employment Relations Commission (PERC).

PERC is composed of seven appointed Commission members. The Commission currently employs 26 full-time staff members.

Commission Members

Under Chapter 123, the 1974 law which made the most recent changes to the structure of PERC, there are seven members appointed by the Governor with the advice and consent of the State Senate. The Commission is called *tripartite* because two of its members represent public employers, two represent unions and three represent the public.

Terms are for three years and only the Chairman of the Commission is a full-time member. The other six members are paid at the rate of \$100 for each six-hour day spent on Commission business.

The representatives of management and labor who sit on the Commission may not speak or vote in any case involving a party with which they are associated.

The Commission's Duties

The Commission is the decision-making body responsible for impasse procedures, unfair practice cases, scope of negotiations matters and questions concerning whether a particular union represents a majority of employees. The Commission makes rules and regulations in these areas and issues decisions on the last three topics.

The responsibilities of the Commission are discussed in each of the following chapters.

The Commission meets monthly to issue decisions. At each meeting the Commissioners decide between ten and twenty cases. Meetings are open to the public pursuant to New Jersey's Open Public Meetings Act.

Like almost all other government agencies, the Commission members generally act upon written recommendations made by the Commission's full-time staff which has researched and analyzed each issue.

As noted, the Commission meets from time to time to consider decisions. It also adopts rules and regulations to govern procedures in the various areas of its responsibility. In each chapter of this book, in addition to reviewing key decisions, we have also outlined the rules and regulations which must be followed by parties before the Commission.

The Commission Chairman

The Governor selects one of the three public members to act as Chairman. The Chairman is the day-to-day chief operating officer of PERC. The incumbent is responsible for personnel matters, overall staff assignment and, very often, is delegated decision-making powers by the full Commission.

Division of Staff Responsibilities

The staff is under the overall direction of the Chairman. However, there are four distinct areas of operation.

1. Assistants to the Chairman

The Chairman is assisted in day-to-day decision-making and operation by a Special Assistant. The Special Assistant has also been designated to perform some official functions on behalf of the Commission, such as the hearing and deciding of requests for injunctions (See Chapter 5). An Assistant to the Chairman aids in internal operating matters.

2. General Counsel

The General Counsel is the chief legal officer of the Commission. The General Counsel and two Deputies provide legal

advice with respect to matters before the Commission and serve as the representatives of PERC in the courts of New Jersey. PERC differs from most State agencies which must rely upon the State Attorney General for all legal representation.

3. *The Director of Unfair Practices and Representation*

This individual has overall responsibility for all unfair practice and representation cases which are filed. The Director or the 11 staff members assigned to this department hold conferences in unfair practice and representation cases, act as hearing examiners in representation matters, conduct elections concerning representation, and investigate and hear objections and challenges to elections.

The Director also has the delegated power to dismiss charges and petitions which are insufficient and assign more difficult matters to hearing. The Director issues decisions regarding representation questions. Decisions of the Director are reviewable by the Commission.

4. *The Director of Conciliation and Arbitration*

This person is responsible for the Commission's mediation, factfinding and arbitration efforts. In addition to a Deputy Director, there are eight full-time staff members assigned to mediate contract disputes.

The Director makes determinations regarding the timing of mediation and factfinding, assigns mediators to disputes, submits lists of proposed factfinders and arbitrators to the parties for their consideration, conducts written and oral training programs for those who mediate, factfind and arbitrate, and provides special mediatory efforts during work stoppages.

The Director assigns the full-time staff mediators to some of the hundreds of mediated disputes in New Jersey each year.

The Director also oversees the agency's *ad hoc* personnel. These people, employed on a *per diem* basis, act as factfinders and arbitrators. Some also perform mediation roles when the Commission's regular staff is unable to do so or the parties directly request a specific individual to mediate. Almost all of these *ad hoc* neutrals have extensive experience in public sector labor relations and appear on approved lists elsewhere,

such as with the American Arbitration Association. (For a full discussion of mediation, factfinding and arbitration, see Chapter 6.)

Hearing Examiners

Currently three staff members are designated Hearing Examiners to take testimony and issue recommendations in unfair practice matters. (Their role is explored in Chapter 3 at page 00.) Any staff member, including Hearing Examiners, may be assigned to act as a hearing officer on representation questions.

Offices¹

Trenton: 429 East State Street
Trenton, New Jersey 08625
609-292-6780

Newark: 80 Mulberry Street
Newark, New Jersey 07102
201-648-3425

¹. Most PERC staff members work out of the Trenton office. PERC does maintain an office in Newark. Papers to be filed to PERC should be sent to the Trenton address.

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Representation

The issue of representation is the first hurdle which must be overcome in the process of collective negotiations. Who can bargain? Which positions should be bargained for in the same unit? How does the union achieve exclusive representation status? The answers to these questions form a basis for the understanding of representation proceedings before PERC. Relevant sections of C.123 and PERC's rules on representation are *N.J.S.A.* 34:13A-3 and 13A-5.3 and *N.J.A.C.* 19:11.

Who Can Bargain

Public employees who have more than a casual employment relationship with a public employer have the right to join a union in order to negotiate with a public employer. Because the purpose of the bargaining law is to improve labor peace by bringing management and labor to the table, PERC has viewed the "scope of representation" quite broadly. C.123 specifically excludes from coverage under the Act "managerial executives" and "confidential employees." These exclusions are necessary so that management can protect its interests in the bargaining process, and so that employees who are classified as either managerial or confidential are not placed in a conflict of interest. Neither managerial executives nor confidential employees may engage in union activity, form a union or attempt to negotiate over terms and conditions of employment. Managerial employees who do so act at their own risk and without the protection of the Act.

Managerial Executives

C. 123 defines managerial executives as "persons who for-

mulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices."¹ In school districts, managerial executives are the superintendent or other chief school administrator (administrative principal) and the assistant superintendent of the district. If a district employs more than one assistant superintendent, all assistant superintendents should be excluded from bargaining as either managerial executives or confidential employees.²

In other parts of the public sector, police chiefs have been found to be managerial executives where they make recommendations on matters of policy.³ Employees who are merely department heads or shift supervisors are not managerial executives.⁴

Confidential Employees

Employees whose job duties require their involvement in personnel and labor relations on a routine basis are normally considered confidential employees. Membership for those persons in a bargaining unit would jeopardize management's integrity, and therefore confidential employees have no bargaining rights.

To determine if a position is confidential, PERC will look further than the written job description to the actual duties on the job. PERC defines a confidential employee as any employee for whom a principle duty is to assist and act in a confidential capacity to persons who formulate, determine and effectuate management policy in the area of labor relations.⁵

Secretaries to the Superintendent, Assistant Superintendent for Personnel and to the Board Secretary may be considered to be confidential employees, since these positions

1.
N.J.S.A. 34:13A-3.

2.
Passaic County Regional High School District No. 1, Board of Education, H.E. No. 77-3, 2 NJPER 266.

3.
Borough of Fair Lawn, H.O. No. 79-4, 5 NJPER 10001.

4.
Essex County Board of Chosen Freeholders, H.O. No. 77-3, 3 NJPER 55.

5.
N.J.A.C. 19:10-1.1.

require clerical support in the negotiations process: typing of proposals, strategy memorandums, and minutes of closed board sessions.⁶ Since these positions handle confidential labor relations material, and would be expected to continue to have access to and knowledge of these materials in the regular exercise of their secretarial duties in the future, they are confidential employees. The Board Secretary/Business Administrator should be considered a confidential position as well, since the position is involved in the budget process for negotiations and the setting of negotiations settlement parameters.

Costing out of union proposals or collecting information is not enough to classify a position as confidential. Mere knowledge of raw information would not compromise management's right to confidentiality in negotiations.⁷

It is not an unfair practice for a school board to refuse to negotiate over the terms and conditions of employment of a confidential employee. The removal of an employee whose duties make him a confidential employee from a bargaining unit is proper, since the Act does not condition the establishment of the confidential status of an employee upon a determination made by PERC after application by the employer.⁸ However, since no public employer can predict how PERC will rule on the confidentiality of an employee, they may be found guilty of an unfair practice if their opinion on the employee's "confidentiality" is not sustained by PERC.

Temporary Employees

Temporary or substitute employees have been found to have bargaining rights under the law provided they demonstrate sufficient continuity and regularity of employment. Substitute teachers who have worked at least 30 days during a

6.

Jersey City Board of Education, D.R. No. 78-35, 4 NJPER 4065; **Cranford Board of Education**, H.O. No. 78-4, 3 NJPER 278; **Orange Board of Education**, D.R. No. 78-28, 4 NJPER 4001.

7.

Board of Education of the Township of West Milford, PERC No. 56; **Brookdale Community College**, H.O. No. 77-7, 3 NJPER 109.

8.

Passaic County Regional High School District No. 1, Board of Education, PERC No. 77-19, 3 NJPER 35.

given school year and who express a willingness to accept employment as substitutes in the following year may bargain, usually in a unit of all substitutes.⁹ Temporary employees that have a community of interest with regular, permanent employees may be placed in a unit with them.¹⁰ Evening teachers have bargaining rights, and the appropriate unit may be with regular daytime teachers.¹¹

Employees whose salaries are paid by the federal government through the Comprehensive Employment and Training Act (CETA) also have bargaining rights, since they are public employees within the meaning of the law. Indefinite funding of these positions does not render the position "irregular," since the CETA law requires that CETA employees receive the same salaries and benefits as non-CETA employees, and the Secretary of Labor has promulgated regulations that assure the rights of CETA employees to join unions.¹²

Supervisors

In the private sector, supervisors do not have the right to bargain. The Taft-Hartley Amendments to the National Labor Relations Act, passed by the U.S. Congress in 1947, specifically exclude supervisors from the definition of "employee" under the Act. The PERC law does give public sector supervisors in New Jersey the right to organize and bargain collectively; however, the law prohibits mixed units of supervisory and non-supervisory employees except in a few situations. Furthermore, the law prohibits supervisors from being represented by an employee organization that allows non-supervisory employees as members. This would prohibit a state teachers association from organizing and representing principals and supervisors even in separate units from teachers.

9. **Bridgewater-Raritan Regional Board of Education**, D.R. No. 79-12, 4 NJPER 4201; **Rutgers University**, PERC No. 76-49, 2 NJPER 229.

10. **Ocean County Board of Chosen Freeholders**, H.O. No. 79-3, 4 NJPER 4223.

11. **Board of Education of Rancocas Valley Regional High School**, E.D. No. 76-39, 3 NJPER 52.

12. **Passaic County Board of Chosen Freeholders**, D.R. No. 78-29, 4 NJPER 4006; **County of Hudson**, D.R. No. 79-3, 4 NJPER 4147; **Township of Mine Hill**, D.R. No. 79-4, 4 NJPER 4148.

Who are supervisors? The law defines a supervisor as an employee who has the power to hire, discharge, discipline, or effectively recommend the same. In school districts, directors, principals and assistant principals are supervisors; department chairpersons may also be supervisors depending upon their ability to effectively recommend hiring, discipline and discharge. Department chairmen who made recommendations for renewals through the evaluation process have been found by PERC to be supervisors.¹³

Supervisors are prohibited from bargaining in units that contain non-supervisory employees because of the inherent conflict of interest that exists in light of the supervisor's ability to hire, discipline and discharge. The New Jersey Supreme Court addressed the issue of divided loyalties and conflict of interest in *Board of Education of West Orange v. Wilton*.¹⁴ Units of all supervisors may not even be appropriate where a substantial actual or potential conflict of interest exists among them.

The bargaining law does provide that supervisors may be included in mixed units "where established practice, prior agreement or special circumstances dictate . . .". Established practice/prior agreement exists only where the parties had a bargaining relationship and a negotiated contract concerning terms and conditions of employment in effect before the passage of C.303 in 1968.¹⁵ Special circumstances are rarely found that would allow supervisors to bargain with non-supervisors. The fact that supervisors also perform non-supervisory duties does not support the "special circumstances" exclusion.¹⁶ One special circumstance could occur if the titles found to be supervisory are already covered by a valid contract; those positions could remain in a mixed unit of supervisors and non-supervisors until the expiration of that contract.¹⁷

13.

Freehold Regional High School Board of Education, D.R. No. 78-41, 4 NJPER 4090.

14.

Board of Education of West Orange v. Wilton, 57 NJ 404 (1971).

15.

West Paterson Board of Education, PERC No. 77.

16.

Freehold Regional High School Board of Education, op. cit.

17.

Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248.

Even if established practice or prior agreement exists that would allow supervisors to remain in a unit with non-supervisors, the showing of substantial actual (as opposed to potential) conflict of interest will cause these positions to be removed from the mixed unit. Participation by supervisors in a strike along with regular teachers has been found to demonstrate a "substantial actual conflict of interest," sufficient to warrant the severance of the supervisors from the teachers' unit; where as here the petition to sever the supervisors was filed prior to the execution of the most recent contract, the severance is effective immediately.¹⁸

Before employees who have bargaining rights can negotiate, they must organize themselves in an appropriate unit and be recognized. The "appropriate unit" consists of all employees whose terms and conditions of employment are to be bargained over by the union. PERC and the courts have been disposed toward broad based units in order to avoid fragmentation.

To determine whether the unit petitioned for is an "appropriate unit," PERC will consider whether a community of interest exists between the positions, the negotiations history between the parties, established practice, potential conflict of interest, and employer considerations (the employer's authority and structure). Community of interest is normally the most important criterion, and is determined by evaluating such factors as: whether the positions have similar wages, hours, grievance procedures and other terms and conditions, whether there is common supervision, and the location of employment.¹⁹

PERC has the authority to determine the "most appropriate" unit as well; this was enunciated by the New Jersey Supreme Court in 1974.²⁰ Where the proposed unit is questioned, PERC must determine the most appropriate unit, even

18.

River Dell Board of Education, H.O. No. 78-15, 4 NJPER 4128; affirmed, PERC No. 78-85, 4 NJPER 4085.

19.

Bergenfield Board of Education, PERC No. 7; Garfield Board of Education, PERC No. 16.

20.

State of New Jersey v. Professional Association of New Jersey Department of Education, 64 NJ 231 (1974).

though that configuration may not have been suggested by either party.

To be an appropriate unit for collective bargaining, the unit must be comprised of more than one person.²¹ At least two persons must be in a unit before it can be appropriate for *collective bargaining*.²²

Units composed of both professional and non-professional employees of a school have been found to be appropriate because the positions share a community of interest. These positions have a common employer, work in the same buildings, and have similar goals and purposes, "i.e. the education and betterment of students."²³ (Units of professionals must be allowed to vote as to whether they will allow non-professionals to be in the same unit, however.)

Exclusive Representation

"Exclusive representation" is a right and an obligation which is granted to and imposed upon the employee representative who represents a majority of the employees within an appropriate unit.

The rights conferred by "exclusive representation" include the right to be the sole representative of all employees who are members of that unit. This right applies to both collective negotiations and the processing of grievances. When an exclusive representative exists, no other representative is permitted to engage in either collective negotiations or the processing of grievances.

The representative who is entitled to "exclusive representation" has the obligation to, fairly and without discrimination with respect to an employee's membership in the employee organization, represent all the employee members of the unit in collective negotiations and grievance processing. The ex-

21. Borough of Jamesburg, D.U.P. No. 79-5, 4 NJPER 4180.

22. Delaware Valley Regional High School District Board of Education, D.R. No. 79-15, 4 NJPER 4225.

23. Spring Lake Heights Board of Education, D.R. No. 79-21, 5 NJPER 10055; Board of Education of the Township of West Milford, PERC No. 56.

clusive representative is guilty of an unfair practice if it discriminates against an individual or group of individuals because they are not members of a specific employee organization. However, the existence of a representative who is entitled to exclusive representation does not preclude the simultaneous existence of a minority organization.

Public officials can meet with minority representatives for the purpose of hearing the views and requests of the unit employees who are members of the minority representative organization so long as: (a) the majority representative is informed of the meeting; and, (b) modification of any terms and conditions of employment of the unit employees is solely made through negotiation with the majority representative. Additionally, the minority representative is not permitted to process grievances.

Once a representative claims to be a majority representative, there are two possible ways to become an exclusive representative. The alleged majority representative may be granted recognition as the exclusive representative of the unit employees by the public employer, if the public employer believes the alleged majority representative does, in fact, represent a majority of the unit employees. PERC can also hold a certification election to determine the actual majority representative of the employees in the unit.

Recognition

When a public employer is presented with a request to *recognize* an employee organization as an exclusive representative, the public employer and the employee organization may resolve the matter without the intervention of PERC. However, the public employer is not obligated to grant recognition to a union, and may require the employee organization to request PERC to hold an election.

In order to recognize an employee organization as the exclusive majority representative, the public employer must first satisfy itself that the employee representative has been freely chosen by a majority of the employees in the appropriate unit to be their representative for the purpose of collective

negotiations and grievance processing. To satisfy this requirement, the public employer must conduct a suitable check of the *showing of interest* presented by the employee organization.

This suitable check requirement is met, in most cases, by examining authorization cards or petitions signed by a majority of the employees in the unit. There is a danger in checking cards if the employer does not wish to recognize the union. In that case, the cards should be immediately returned to the union without examination. The signatures can be checked against endorsements on payroll checks. If the language on the authorization card is confusing as to whether the employee is seeking an *election* for a majority representative or is designating that specific employee organization as his choice for majority representative, then the public employer probably is not justified in granting recognition to that employee organization. It is not required that an employee organization actually have a majority of the employees in the unit enrolled as *members* of the employee organization. All that is required is that a majority of the employees in the unit *desire to be represented* by the employee organization for the purpose of collective negotiations and grievance processing.

Next the public employer must have posted a conspicuous notice of its intention to ~~grant~~ recognition to the named employee organization without an election. The notice must be posted upon the bulletin boards where employee notices are normally posted and must be posted for at least ten consecutive days.

If the public employer has discussed or received a written communication from any other union within the preceding year (even if the communication simply expressed the union's consideration of possible employee representation), the public employer must give that other union written notification at least 10 days prior to the grant of recognition. If the other union objects to the granting of recognition, it can file a petition to *intervene* with PERC.

Recognition may not be granted if within the ten-day period another union either notifies the public employer of a claim to represent any employees involved in the unit or files a

certification petition with PERC. If the public employer refuses to grant recognition, the public employer may file a petition for certification with PERC, or the public employer may inform the union that recognition will not be granted, and if the union still desires to seek exclusive representative status, then the union must file a petition for certification with PERC.

Certification

The Commission provides three different petitions which may be filed to resolve a question concerning representatives. An employee-filed Petition for Certification of Public Employee Representative ("RO" petition) may be filed by public employees or a public employee representative and must be accompanied by adequate evidence of employee interest. This petition may be filed where unrepresented employees seek to form a collective negotiations unit; where unrepresented employees seek to be added to a unit already in existence (unit consolidation); where represented employees seek to change their negotiations representative; and where represented employees seek to sever themselves from an existing unit for the purpose of seeking separate representation.

An employer-filed Petition for Certification of Public Employee Representative ("RE" petition) is generally filed where an employer is confronted by competing claims of employee representatives to represent the same employees, or where the employer has received a claim for initial or continued recognition of an employee representative and has a good faith doubt as to the representative's majority status.²⁴

All petitions for certification must contain the following items:

- a. Name, address, telephone number of the public employer and the person to contact, including his title if known;
- b. description of the unit including the approximate number of employees and their general job classifications;
- c. date of the request for recognition and the date such

²⁴.

Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248.

request was declined, or a statement that no reply has been received;

d. name, address and telephone number of any existing recognized or certified exclusive representative, and the date of such certification or recognition;

e. the expiration date of any applicable contract, if known;

f. names, addresses and telephone numbers of any other employee organizations known to be interested in representing employees of that unit;

g. name, telephone number, signature, title and affiliation with any employee organization, if any, of the person filing the petition for certification;

h. any other relevant facts.

In addition to the above requirements, petitions for certification filed by employee representatives must be accompanied by a sufficient *showing of interest*. A sufficient showing of interest requires not less than 30 percent of the employees in the unit alleged to be appropriate. A typewritten alphabetical listing of the employees designating the employee representative must also be submitted to PERC when the petition for certification is filed by an employee representative. PERC will not furnish the showing of interest and the alphabetical list to any other party involved.

Petitions for certification filed by a public employer must also state that a claim for representation has been made by one or more public employees, groups of public employees, individuals or unions and that the public employer believes that it is possible that the union does not represent a majority of employees (commonly called a "good faith doubt"). Petitions for certification filed by the public employer do not involve any showing of interest as is required when an employee representative files a certification petition. One original and four copies of all petitions must be filed with PERC.

When PERC receives any petition for certification, it will conduct an investigation to determine the facts. At this time, the public employer must furnish PERC a list of any other unions who have claimed, within the last 12 months, to represent any employees who are included in the unit. This list must contain the names, addresses and telephone numbers of those unions. PERC will also give the employer notices to post

indicating that a petition has been filed so that employees will understand what is happening.

As a result of its investigation, PERC will determine whether or not a valid *question concerning representation* of employees exists and whether, at first glance, the proposed unit is appropriate. If the agency decides that there is no valid question concerning employee representation existing at that time, it may request the person who filed the petition to withdraw it. If that person does not withdraw the petition, PERC is empowered to dismiss the petition. The most common reason is a lack of sufficient showing of interest by the employee representative.

At this point in the representation proceeding, PERC will determine whether another *investigation* or *hearing* is appropriate. The parties may agree on the appropriate unit, where and when the election should be scheduled and who is eligible to vote. If they do, they will probably sign a consent election agreement. If this agreement is signed (and no other union objects) PERC will then hold the election without further investigation. If a hearing is determined to be appropriate PERC will send a notice to the parties. This notice will state the time, place and nature of the hearing. It will also state the names of the parties involved, the unit claimed to be appropriate, and the position each party has taken. This hearing is supposed to be an investigatory rather than an adversary proceeding.

After conducting this investigation, PERC has discretion with respect to what action it will take. It may request the party filing the petition to withdraw it. PERC will take these steps only when it appears to it that there is no reasonable cause to believe that a valid *question concerning representation* in an appropriate unit exists. Alternatively, PERC may issue an order directing an election in the appropriate unit. For the agency to issue an order directing an election, it must appear to it that a valid question concerning representation does exist, that an election will reflect the free choice of the employees in the unit, and that the policies of the Act will be furthered.

Timing

Petitions for certification (and decertification) are not allowed at all times. Where a valid contract exists between the parties, a petition for certification will be considered timely in a school district only if filed between September 1 and October 15 in the last 12 months of such an agreement. For example: if you have a contract expiring June 30, 1981, PERC will consider a certification or decertification petition only if it is filed between September 1 and October 15, 1980. This is the "contract bar" rule, and it protects the privileges of the majority representative and helps to maintain labor stability.²⁵

Where there has been an election, but no contract has yet been negotiated between the new majority representative and the employer, the election itself serves as a bar to further petitions by other employee associations and the employer for a period of one year. The "new" union must have an opportunity to negotiate on behalf of the employees without the pressure of a competing union. Where an election was held and employees voted against being organized, no election may occur for at least one year.

An employee organization which has been voluntarily recognized by the public employer receives the same benefits as if it had been certified by PERC, in that a "recognition bar" to representation petitions exists for a period of one year.

Negotiations over a successor agreement are not a bar to certification and decertification petitions.

The Election

The representation election is the procedure through which PERC attempts to assure that the true and uncoerced desires of a majority of the employees in the unit are determined with respect to who shall represent them. Where a group of non-professional employees (either organized or unorganized) de-

²⁵.

Hamilton Township Board of Education, D.R. No. 78-36, 4 NJPER 4062.

sire to consolidate with a group of professional employees, and PERC finds the combined unit to be appropriate, two elections must be held. If the non-professionals seek to be added to the unit, then the professionals are asked if they would permit non-professionals in their unit.

It is of interest to note that on several occasions in which there were two competing employee representatives from which to choose, the organization that had the largest number of actual *members* before the election, nevertheless, lost the election. This has occurred even when the larger organization includes more than a majority of the employees in the unit within its membership. Because of this occasional result, mere membership lists are generally insufficient to dispel the "good faith doubt" of the public employer as to the majority representative status of an employee representative who is seeking recognition.

If all parties involved in the representation election stipulate that a secret ballot election should be conducted by PERC, it will proceed with the election. A proceeding under this set of circumstances is termed a *consent election*. For a consent election to be conducted, the parties must agree on the composition of the unit, the eligibility period for participation in the election, the representatives to be included on the ballot, and the dates, hours and location of the election. The conduct of the election is the same no matter which situation has created the need for it. The election will be conducted by PERC staff personnel or by neutrals which PERC hires for that election.

The public employer has an obligation, unless directed otherwise by PERC, to file an eligibility list with PERC. This list must be received by the agency at least ten days prior to the election date. It must contain an alphabetical listing of eligible voters along with their mailing addresses and job titles. PERC will make this list available to all parties to the representation proceeding.

PERC will, again, furnish notices of the election which the public employer must post. These notices will contain the following items: the details and procedures of the election; a description of what employees are contained in the unit involved; an explanation of when and for how long an employ-

ee must have been employed to be eligible to vote; an explanation of which, if any, terminated employees would be permitted to vote in the election; the dates, hours and location of the election; and a sample ballot.

All elections will be by secret ballot. Any party may have observers at each polling place. Any party may challenge the eligibility of any individual to vote in the election, and if the challenge appears to be for "good cause" the personnel conducting the election will permit the individual to vote but will impound and keep separate his ballot.

Upon the conclusion of the election, each party will be furnished with a tally of the ballots cast, excluding all challenged ballots. Each party then has five days to file objections to the conduct of the election. An original and four copies of all objections must be filed. The objections should contain a short statement of the reasons for each objection. The objecting party must also serve copies of the objections on all other parties.

If there are objections to the conduct of the election, or if the challenged ballots are sufficient to affect the outcome of the election, PERC will conduct an investigation. Each party is permitted to submit evidence and statements of position on both the challenges and the objections. If PERC determines that a hearing would be appropriate under the circumstances, it can order that one be held. Whether a hearing is held or merely an administrative investigation is conducted, the objecting or challenging party has the obligation to submit evidence sufficient to uphold his objection or challenge.

Upon the conclusion of the administrative investigation or the hearing, or if no objections have been filed and the number of challenged ballots are insufficient to affect the outcome of the election, PERC will certify the election results to the parties. The exclusive representative is determined by the majority vote of the valid ballots cast in the election.

Decertification

Where an existing employee representative has previously been *recognized or certified* as the majority representative a petition for *decertification* ("RD") may be filed by an employ-

ee, group of employees, or any individual acting on the behalf of an employee or group of employees. The decertification petition must allege that the recognized or certified employee representative continues to claim to represent but no longer represents the majority of the employees in the unit.

Note that a public employer is not entitled to file a petition for decertification. When the employee representative has previously been recognized by the public employer, but not certified by PERC, and if the public employer has a "good faith doubt" with respect to whether or not the employee representative continues to represent a majority of the employees in the unit, the public employer can obtain the same result of seeking an election by filing a petition for certification. However, if the employee representative has previously been certified by PERC as the majority representative, the public employer cannot request a new certification or decertification election.

Petitions for decertification of an employee representative must contain the following:

- a. a statement that the certified or recognized employee representative no longer represents a majority of the employees in the unit, but continues to claim to do so;
- b. all the information required to be included in a petition for certification;
- c. a "showing of interest" of at least 30 percent of the employees in the unit, indicating that they no longer desire to be represented for the purpose of collective negotiations by the employee representative recognized or certified as the majority representative.

PERC is authorized to conduct the same investigations pursuant to the decertification petition that it conducts pursuant to a certification petition. Elections are conducted in the same manner as described earlier.

Unit Clarification

A petition for clarification of the unit may be filed either when one party desires to determine whether a specific job classification belongs in the unit or when one party is presently seeking to have certain employees removed from an existing

unit. When either the public employer or the majority representative desires a change in the negotiating unit, it may file a petition with PERC seeking clarification of the unit. Only the public employer or the majority representative is permitted to file a petition for clarification of the negotiating unit.

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit, either the unit definition contained in PERC's certification, or as set forth in the parties recognition agreement. You may not use a clarification of unit petition to increase or decrease the scope of the negotiations unit for other reasons. Normally, a clarification is sought to determine if a particular title was contemplated within the scope of the unit definition and the matter relates primarily to identification. In such cases, for example, the Commission might be asked to determine whether a department chairperson is a "supervisor", and thereby excluded from the unit by the bargaining law.

Occasionally a change in circumstances has occurred which alters an employee's job functions and may result in the inclusion of such function within the intent of the unit description. On the other hand, a new title may have been created by the employer with job functions similar to functions already covered by the unit and therefore warranting inclusion in the unit. Or the employer may have created a new operation or opened a new facility, and then staffed the operation or facility with employees who function similarly to currently represented employees. In these circumstances, a clarification of unit proceeding is appropriate.

In other situations, a clarification of unit may result in persons being removed from the unit. This is so because the Act renders certain negotiations relationships improper, for example, managerial executives. In addition, the Act provides that, unless certain exceptions are present, supervisors cannot be in units with non-supervisors; nor may police be in units with non-police employees. Therefore, clarification of unit petitions are appropriately utilized to seek the exclusion of classifications which may have been included in an existing unit contrary to statutory provisions.

Since a clarification proceeding is concerned with unit

definition, and does not involve the selection of a collective negotiations agent, PERC has not restricted the filing and processing of such petitions to prescribed time periods. Clarification petitions may be filed at any time, however, PERC *may* allow the disputed positions to remain inside or outside the unit until a valid contract expires.²⁶

²⁶.

Clearview Regional High School Board of Education, *op. cit.*

3

Unfair Practices

Background

Section 7 of the Public Laws of 1968, Chapter 303, stated the general obligations of public employers and employee organizations in the area of labor relations.¹ However, in a decision handed down by the New Jersey Supreme Court in 1970, it was determined that PERC did not have the authority to remedy violations which resulted in unfair practice charges. Chapter 123, passed in 1974, was in large part designed to give to the Commission that authority. The unfair practices listed in the law are not very different from those under other labor laws, including the National Labor Relations Act which has covered most United States workers for forty years.

What You Should Know About Unfair Practice Charges

Most charges are filed by unions against employers. About 75% of all unfair practice charges filed with PERC are dismissed or withdrawn without a complaint even being issued by PERC. Of the remaining that result in a hearing, a significant percentage result in a dismissal of the charge. It should be apparent, then, that many charges are filed for tactical purposes. The charging party may want to convince its members that it is doing a good job for them, convince the community that the other party is the "bad guy" or persuade the other party to change its position to avoid the consequences of an unfair practice charge. The response to such charges should be reasoned. Over-reaction to a meritless charge will not serve you well. If the processing of the charge

1.

These obligations are the same contained in Chapter 123 discussed later in this section.

by the board has been delegated to an attorney or labor relations professional, let them worry about it. If you are convinced that your course of action is correct, proceed with it. If the other side seems to be violating the law, consider filling a charge of your own.

The Law

The general obligations imposed by Chapter 123 are as follows:

1. Public employees have the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.
2. Employee organizations (unions) designated by a majority of employees in an appropriate unit shall be the exclusive representative for collective negotiation concerning the terms and conditions of employment of those employees.
3. A majority representative of employees (union) is entitled to act for and to negotiate agreements covering all employees in the unit.
4. A majority representative bargaining for employees (union) is responsible for representing the interest of all employees without discrimination and without regard to union membership.
5. Unions and public employers must meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment of employees.
6. When a union and a public employer reach agreement on terms and conditions of employment, those terms and conditions must be placed into a signed contract between the parties.

The Meaning Of The Law—Unfair Practices Of Employers

1. *Interfering With, Restraining Or Coercing Employees In The Exercise Of The Rights Guaranteed To Them By This Act.*

This section is designed to prohibit an employer from interfering with employee rights. Because of the general and encompassing nature of this section, PERC usually finds a

violation of this specific section when an employer violates any other section of the law.² For instance, if an employer violates section three by seeking to reward or punish employees for their membership and activities in a union or their refusal to join and support that union, PERC will then find that the employer violates section one which guarantees the employee all rights within the Act.

PERC has also held that it is not relevant whether the employer did not *intend* his action to discourage union activities.³

Employers may make statements concerning the union or unionization as long as those statements are not coercive in nature. During election campaigns, for example, the employer may make statements regarding the past relationship with employees and the predicted effects of unionization upon the operation.

There are employer actions which may be direct violations of the section. For example:

- Threatening an employee with dismissal if he represented a grievant.⁴
- Threatening an employee with discipline because he became offensive in speech and action during a grievance meeting.⁵
- Threatening an employee with non-renewal because he asked for union representation.⁶
- Promising employees better benefits if they support the township's negotiating positions.⁷
- Questioning employees concerning why they are not members of the union.

2. Galloway Township Board of Education, PERC No. 77-3, 2 NJPER 254.

3. Camden County Board of Chosen Freeholders, PERC No. 78-16, 3 NJPER 332.

4. Clinton Township Board of Education, PERC No. 78-45, 4 NJPER 4038.

5. Hamilton Township Board of Education, PERC No. 79-59, 5 NJPER 10068.

6. North Warren Regional Board of Education, PERC No. 79-9, 4 NJPER 4187.

7. Township of Hillside, PERC No. 77-47, 3 NJPER 98.

2. *Dominating Or Interfering With The Formation, Existence Or Administration Of Any Employee Organization.*

The object of this section is to insure that employee organizations representing employees are not controlled or assisted by the employer.

Domination of a labor organization has been held to occur when:

- An employer sets up a union, funds it, or makes its decisions.
- An employer controls internal actions of a union, such as election of officers.

Employer interference occurs when an employer:

- Allows a union, which formerly was a majority representative but has lost an election, to process grievances.⁸
- Attempts to force employees to join a specific labor organization.
- Asks newly hired personnel to fill out union membership and dues deduction cards.
- Pays sums of money to union officials or union members because of their membership in the union.
- Allows one union to use the employer's facilities to attract new members during an organizational campaign while denying that right to other unions.

3. *Discriminating In Regard To Hire Or Tenure Of Employment Or Any Term Or Condition Of Employment To Encourage Or Discourage Employees In The Exercise Of The Rights Guaranteed To Them By This Act.*

At the heart of any law guaranteeing employees the right to join together in a bargaining sense are those protections which the law provides to individual employees. Both employers and unions possess the power to coerce employees in their decision to be unionized, their choice of a union and their support or non-support of a union's actions.

⁸.

These facts arose in *Bayonne Board of Education*, PERC No. 78-60, 4 NJPER 4077 but this portion of the Act was not cited by the charging party.

Section 5.4(a)(3) and 5.4(b)(1) are designed to protect employees from such coercive action of the employer and the union, respectively. Later we will discuss 5.4(b)(1) and the union's responsibilities.

Employer Discrimination

Definition

Section 5.4(a)(3) makes it an unfair practice for any public employer to take an action against or in favor of an employee because of his or her union activity or lack of union activity.

Some examples of employer actions which PERC has found to be violative of 5.4(a)(3) include:

- Refusing to promote a college professor because of his union activities.⁹
- Transferring township employees because they pressed union overtime claims.¹⁰
- Filing of tenure charges against a teacher based upon a letter to the union membership.¹¹
- Reprimanding a fireman because of statements he made during a grievance meeting.¹²

Standards of Proof

But how does PERC determine whether an employer action was *motivated* by a desire to penalize or reward union activity? PERC must analyze a number of factors to make that determination. What hearing examiners from PERC and the Commission itself attempt to decide is whether *any* part of the action, whether it be a discharge or a transfer or any other personnel action, rested upon an employer intent to discriminate for or against an employee based upon that employee's union activities. In order to make that decision, the

9.

Brookdale Community College, PERC No. 78-80, 4 NJPER 4123. Currently on appeal.

10.

Township of Ewing, PERC No. 78-52, 4 NJPER 4055.

11.

Manalapan-Englishtown Board of Education, PERC No. 78-91, 4 NJPER 4134.

12.

City of Hackensack, PERC No. 78-30, 4 NJPER 4011.

Commission has established *standards of proof*. These are the various factors which generally must be present before a violation can be found.

There do occur, from time to time, employer actions which are obviously, because of the facts, violations of 5.4(a)(3). For example, an employer's supervisor tells a new employee that she is being transferred because she passed around union cards at lunch-time in the cafeteria. If such an event did occur, the transfer would be illegally discriminatory on its face.

However, what if such an obvious case was not present? Then PERC must sift through all the facts to make a final determination.¹³

Employee Activity

The first element to be established in a discrimination case is whether the employee in fact was active in a union or not. If an individual claims that he was demoted because he was a union activist and he actually had engaged in no union activity, there could be no violation.

The *extent* of union activity could also be critical. If a public employer had a thousand employees and 20 of them were union officers, it would be less likely that an employer had violated the law in transferring a less active, non-officer. This would especially be true if there was no assertion or evidence that the employer ever took action against more active union supporters.¹⁴

Employer Knowledge of Activity

One factor often at issue in private sector discrimination cases but almost non-existent to date in New Jersey's public sector is the question of whether the employer knew of the employee's union activity *prior* to the time that the employer

13.

Throughout the remainder of this section, we shall use also the example of the employer action **against** an employee. Keep in mind that employers may not **reward** employees for their activity or non-activity.

14.

Pine Hill Board of Education, PERC No. 79-98, 5 NJPER 10134.

made the decision to act.¹⁵

Generally, it is sufficient for those agents (supervisors) who make the decision to take an action to have knowledge of the employee's activity.

Timing of Employer's Action

Another factor which has received less attention in PERC cases than elsewhere has been the issue of timing of the employer action. The closer the employer's action occurs after the employee's union activities, again, the more likely a violation has occurred.¹⁶ If an employee is transferred in 1979 and claims that the grievance he filed in 1976 is the reason, the chance of establishing that case would be remote.

Anti-Union Hostility

Another critical element analyzed is whether the employer has exhibited anti-union hostility (*animus*). Any proven violation of 5.4(a)(1) (discussed earlier in this chapter) is proof of an employer's anti-union animus. If an employer's supervisor has threatened one employee with reprisal if he files a grievance, it is more likely that the employer has discriminated in the discharge of another activist. This does *not* mean that one violation *proves* another but, rather, that there is reason to analyze more vigorously the employer's action.

In order for anti-union animus to be used as a basis for finding of a violation, it must be in the minds of those who actually make the final decision. For example, PERC found that a supervisor was motivated by anti-union considerations when he refused to recommend a professor for promotion. However, PERC dismissed the charge on the grounds that the College's Board of Trustees acted upon legitimate reasons which were completely free of anti-union "taint."¹⁷

15.

Perhaps this is because so few of the unfair practice charges filed at PERC allege employer anti-union discrimination as compared with charges filed with the private sector's National Labor Relations Board.

16.

Salem County Board of Vocational Education, PERC No. 79-99, 5 NJPER 10135.

17.

State of New Jersey, PERC No. 78-55, 4 NJPER 4072. Currently on appeal.

Disparate Treatment

Another consideration is whether the employer has acted one way with respect to an employee with union activity and another way with an employee with no such activity. Where all other factors are identical, a finding of a violation can turn on this issue.

Legitimate Business Justification

A key element which must be investigated is whether the employer has a solid reason (or reasons) for his action affecting a union activist. In the lead case in this area¹⁸ and in several other decisions, PERC has stated that the standards it employs to determine if 5.4(a)(3) has been violated "uphold the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities." In short, mere union activity does not insulate an employee from normal employer decisions.

For example, a college did away with a job title; consequently, an employee who had some union activity could not be promoted. PERC held that the decision to do away with the title was planned in advance and was not designed to discourage union activity.¹⁹

In another case, PERC found that a school board did not violate the Act when it refused to rehire a non-tenured teacher. PERC concluded that the board's concern over the teacher's demonstrated inability to control his classroom was a legitimate business justification. According to the Commission's decision:

... the Commission squarely place(s) upon the shoulders of the charging party the burden for proving its case by a preponderance of the evidence. Once the charging party has shown that an employee who has been disciplined, discharged, etc. has engaged in protected activity and that the employer had knowledge of such activity and was hostile toward the union, a prima

18.

Board of Education of the Borough of Haddonfield, PERC No. 77-36, 3 NJPER 71.

19.

New Jersey College of Medicine and Dentistry, PERC No. 79-11, 4 NJPER 4189. See also City of Camden Board of Education, PERC No. 79-40, 5 NJPER 10028.

facie (a)(3) violation is made out. The burden then shifts to the respondent which must demonstrate that its actions were taken for legitimate reasons. If the evidence produced at hearing indicates that the rationale offered by respondent is merely pretextual, a violation of the Act may be found. However, if the evidence indicates that the respondent's justification is valid, then it becomes the obligation of the trier of fact to determine, bearing in mind that the charging party has the burden of proof by a preponderance of the evidence, that the action was taken, at least in part, in retaliation for the employee's exercise of protected rights.²⁰

4. *Discharging Or Otherwise Discriminating Against Any Employee Because He Has Signed Or Filed An Affidavit, Petition Of Complaint Or Given Any Information Or Testimony Under This Act.*

This section is intended to protect employees who file charges with PERC or attempt to otherwise use the procedures of the law to gain their rights. Some violations of this section may include:

- Disciplining an employee because he or she filed a charge against an employer or a union.
- Denying promotions to employees because they testified during a PERC hearing.

5. *Refusing To Negotiate In Good Faith With A Majority Representative Of Employees.*

As was anticipated in the first edition of this book, the most difficult area of Chapter 123 to interpret is this section. A later chapter is devoted to the issue of *what* it is that public employers must bargain over. (See Chapter 4, "The Scope of Negotiations".) Many questions remain. In this area it is particularly important for you to review problems with your professional negotiator, your board attorney and NJSBA's Labor Relations Department.

Public employers must negotiate in good faith with majority representatives concerning terms and conditions of employment.

20.

North Warren Regional Board of Education, PERC No. 79-9, 4 NJPER 4187.

Good Faith

There are some employer actions which, in themselves, are examples of bad faith bargaining:

- Refusing to negotiate over the effective date or length of the contract.²¹
- Reducing the work year and compensation without negotiations.²²
- Shifting work to non-unit personnel of the employer without negotiations.²³
- Subcontracting unit work without negotiations.²⁴

At times, a union will file a charge contending that an employer's conduct during bargaining violates the law despite the fact that the employer has committed no obvious violation (such as a refusal to meet). PERC has followed the course set down by other agencies in this area. In a decision involving the state colleges of New Jersey,²⁵ PERC said it would consider the entire pattern of bargaining, what is usually called the "totality of conduct." Generally, no one position taken at the bargaining table can be the basis for finding a violation. Unless a bargaining position is itself a violation of law (for example, an employer's demand that only union members can file grievances) the position taken can only be an *indicator* of bad faith. If the employer makes proposals which are totally unacceptable on many issues and refuses to even consider alternatives, those positions, when considered together, *may* reveal a pattern of bad faith. Certainly, if an employer is violating Chapter 123 in other respects there will be greater suspicion about the bargaining positions taken by it. The discipline of union members to discourage union activity, for example, gives more weight to a union's charge that the

21.

Dover Board of Education, PERC No. 76-34, 2 NJPER 188.

22.

Piscataway Township Board of Education, PERC No. 77-85, 3 NJPER 169.

23.

Piscataway Township Board of Education, PERC No. 78-81, 4 NJPER 4124.

24.

Township of Little Egg Harbor, PERC No. 76-15, 2 NJPER 5.

25.

State of New Jersey, PERC E.D. No. 79, 1 NJPER 39.

employer has acted in bad faith at the bargaining table. However, even when away-from-the-table violations have occurred, it does not necessarily follow that the employer is engaging in bad faith bargaining.

It has been said often that *the duty to bargain does not impose the duty to agree*. An employer is not forbidden from seeking or reaching an agreement beneficial to its interests. The employer may be insistent during the course of bargaining, it may focus on issues it believes to be important and it may require concessions in return for its agreement on items. This section of the law was not intended to strip the employer of its right to engage in hard bargaining. It was designed to protect the bargaining relationship and to provide a framework for meaningful bargaining.

Majority Representative

The duty to bargain can only exist with a labor organization that has been validly recognized or certified as having represented a majority of employees in an "appropriate bargaining unit." (For a full discussion of "certification" and "recognition," see Chapter 2, "Representation".) Thus, negotiating with or processing grievances through a minority organization is a violation of the duty to negotiate in good faith.²⁶

An employer has no duty to negotiate with a bargaining agent for a single employee.²⁷ If an employee cannot be included in a unit with at least one other employee, there can be no requirement to negotiate.

Terms And Conditions Of Employment

Once it is established that employees have selected a majority representative in an appropriate bargaining unit, the public employer must negotiate in good faith upon the demand of the union to change *terms and conditions of employment*. (For a full discussion of "terms and conditions" see Chapter 4, "The Scope of Negotiations.") Generally, "terms

26.

Bayonne Board of Education, PERC No. 78-60, 4 NJPER 4077.

27.

Shrewsbury Township, PERC No. 79-42, 5 NJPER 10030.

and conditions" include wages, hours, fringe benefits and other working conditions.

Sources Of Terms And Conditions Of Employment

There are several sources for terms and conditions of employment. The most obvious is the labor contract. But Federal and State law as well as State administrative agency rules and regulations can set or affect terms and conditions. In addition, the school board's *policies* and the *practices engaged in the school district* may set or affect terms and conditions.

Changing Terms And Conditions

Generally, a public employer may not change a term and condition of employment without engaging in good faith negotiations with the union. This is true even when a contract has expired.²⁸

If a contract or an agreement during negotiations clearly allows an employer to deviate from a term and condition, then there would be no obligation to negotiate.²⁹ This is one form of a union "waiver" to the right to negotiate.

Allowable Unilateral Changes In Terms And Conditions

In addition to the clearly expressed "waiver" discussed above, there are certain other circumstances in which the employer may act to change an established term and condition of employment.

- If a Federal or State law, rule or regulation changes, the term and condition must change to meet legal requirements.³⁰
- If it is determined that there has been no "meeting of the minds" (that is, that the parties did not really have a

28.

Piscataway Township Board of Education, PERC No. 91, 1 NJPER 49 and North Brunswick Township Board of Education, PERC No. 79-14, 4 NJPER 4205.

29.

State of New Jersey, PERC No. 77-40, 3 NJPER 78.

30.

State of New Jersey, 78 NJ 54 and Township of West Windsor, 78 NJ 98, both August, 1978.

common understanding of their agreement), the employer may be able to continue the *current* term and condition and not put a new one into effect. This failure to have a meeting of the minds would not allow an employer to change the term and condition any way it saw fit.

- The union may waive its negotiating rights by waiting an unreasonable length of time to seek negotiations. If the employer makes known its intention to change a major educational policy (an *illegal* subject of bargaining) and there will be *impacts* of that decision on existing terms and conditions (see *Impact Bargaining* later in this chapter), a union which waits a year to object and then does so a day before the policy change goes into effect may have *waived* the right to negotiate in that circumstance.
- The employer may change a term and condition after a *genuine impasse* has been reached. This would occur when it became apparent that the parties would make no progress within a reasonable period of time. Once a *genuine impasse* has been reached, the employer, if it desires to make a change, must implement *the last offer it has made to the union*. In one case, a city sought to extend the work week by five hours for white collar employees. A genuine impasse was reached, according to PERC, and the employer could change the employees' hours by five hours, no more and no less.³¹ If the parties are engaged in full negotiations over a successor contract and a genuine impasse is reached, the employer must, if it desires to change terms and conditions, implement the *entire* agreement including all settled matters *and* the employer's last offer on all unresolved matters.³² Even after implementation, the employer remains under a duty to continue to negotiate in good faith.³³

One question which remains unanswered is whether a *genuine impasse* can occur *prior* to exhaustion of PERC's mediation and factfinding procedures.

31.
City of Jersey City, PERC No. 77-58, 3 NJPER 122.

32.
Board of Education of the Township of Willingboro, PERC No. 78-20, 3 NJPER 369.

33.
City of Jersey City, *op. cit.*

- Another condition under which an employer may be able to make a unilateral change in a term and condition is where a union, during the course of negotiations, seeks to include in a contract language which would prohibit the employer from acting in a certain way and then withdraws its demands on the topic.³⁴

Impact Bargaining

Even when an employer changes a major educational policy (an *illegal* subject), there exists a duty to negotiate over the *impact* that change will have on existing terms and conditions.³⁵ (This topic is more fully explored in Chapter 4, "The Scope of Negotiations.") It would normally be a violation of this subsection if such impact bargaining did not occur.

The Authority Of The Bargaining Team

In several cases, PERC has explored the authority of a party's bargaining team. Can the team legally bind the party it represents to a labor agreement? Has the party reserved to itself the ultimate authority to ratify or reject the tentative agreement?

In one case, the board had authorized the team to act in its behalf. That team reached a memorandum of agreement which the board unanimously rejected. PERC adopted the long-standing private sector rule that a party can be bound by its "agents." The board was ordered to sign the agreement.³⁶

A party can reserve to itself the final authority for reaching an agreement.³⁷ But it must do so through a clear and expressed statement to the other party that its team

34.

Township of West Windsor, PERC No. 79-79, 5 NJPER 10110.

35.

Warren Hills Regional Board of Education, PERC No. 78-89, 4 NJPER 4094. On appeal.

36.

Bergenfield Board of Education, PERC No. 90, 1 NJPER 44.

37.

Long Branch Board of Education, PERC No. 77-70, 3 NJPER 300.

cannot bind the party, but can only reach tentative agreement.

A party cannot rely upon a past history of ratification to establish that the other party is automatically bound by its team in negotiation.³⁸ PERC will consider "whether, during the course of the particular negotiations in dispute, there was an absence of oral or written qualifying statements or general conduct by negotiating representatives from which binding authority on the part of the negotiating teams to conclude an agreement could reasonably be inferred."³⁹

6. Refusing To Reduce A Negotiated Agreement To Writing

This section makes it a violation for an employer to refuse to sign a contract it has reached with a majority union.

7. Violating Any Of The Rules And Regulations Established By The Commission

To our knowledge no other State or Federal labor law holds that you commit an unfair practice when you violate a procedural rule of an agency. The following example indicates the potential effects of such a provision: PERC's Rules require an unfair practice charge to be signed. Under other labor laws, if the charge is not signed, it simply means that there is no charge. Under Chapter 123, forgetting to sign a charge could itself be an unfair practice! As you can see this section is very broad but it is suspected that it will not be applied very often. In the first such finding, PERC held that a union violated an identical section of the law covering labor organizations when it failed to request negotiations prior to the date set forth in the Commission's rules.⁴⁰ No employer has been found similarly guilty.

38.

Black Horse Pike Regional District Board of Education, PERC No. 78-83, 4 NJPER 4126.

39.

Ibid.

40.

West Essex PBA Local 81, PERC No. 79-84, 5 NJPER 10115. PERC may have taken this allegation more seriously because the union represented police who were covered by a police-fire interest arbitration law with strict timetables for bargaining.

The Meaning Of The Law—Unfair Practices Of Employee Organizations.

C.123 also contains a list of prohibited actions by unions. These sections are rarely the subject of PERC charges. In the first four years of C.123 only one union was found guilty of violating these sections.⁴¹

Employee organizations, their representatives or agents are prohibited from:

1. *Interfering With, Restraining Or Coercing Employees In The Exercise Of The Rights Guaranteed To Them By This Act.*

As the majority representative of employees, a union has an obligation to represent all members of the bargaining unit, not just union members. This is called the Duty Of Fair Representation. Unions are also prohibited from threatening employees or from otherwise forcing them to take or not take certain actions.

Examples of union violations of this section include:

- Refusing to process the grievance of an employee because he or she is not a member of the union.
- Discriminating against employees because of their membership in another labor organization.
- Coercing an employee because he or she opposes actions of the union's officers.
- Attempting to persuade or force an employer to dismiss or discipline employees because they are not members of the union.
- Accepting illegal assistance or domination by an employer.

PERC gives unions great discretion in determining the proper balance to be struck among conflicting interests within the bargaining unit. The theory is that unions must have the ability to say "no" to unreasonable employee demands or requests for arbitration, in order to foster a mature and cooperative relationship with the employer. Thus, PERC

⁴¹.

Bayonne Federation of Teachers, PERC No. 78-60, 4 NJPER 4077.

found that the majority representative did not violate the Act when it dropped certain bargaining demands raised by social workers in a teacher bargaining unit, where there was no evidence of bad faith, fraud, or arbitrary or discriminatory motivation.⁴² Similarly, using the same criteria, PERC found a union refusal to process a grievance to arbitration not to constitute a violation.⁴³

2. *Interfering With, Restraining Or Coercing A Public Employer In The Selection Of His Representative For The Purposes Of Negotiations Or The Adjustment Of Grievances.*

A union violates this section when:

- It refuses to bargain with a professional negotiator selected by the board.
- It attempts to deal directly with individual board members.

3. *Refusing To Negotiate In Good Faith With A Public Employer, If They Are The Majority Representative Of Employees In An Appropriate Unit Concerning Terms Or Conditions Of Employment Of Employees In That Unit.*

The union has an equal obligation to bargain in good faith. The union may violate the law if:

- It takes a "take it or leave it" attitude at the negotiating table.
- It refuses to negotiate concerning board proposals.

4. *Refusing To Reduce A Negotiated Agreement To Writing And To Sign Such Agreement; And*

5. *Violating Any Of The Rules and Regulations Established By The Commission.*⁴⁴

42.

Hamilton Township Education Association, PERC No. 79-20, 1 NJPER 4215.

43.

Council 1, AFSCME, AFL-CIO, PERC No. 79-28, 5 NJPER 10013.

44.

These last two sections are identical to those contained in the employer unfair practice portion of the law.

Remedies

When PERC finds a violation of law, it may issue an order designed to remedy the unfair practice and prevent future illegal actions. The type of remedy ordered by PERC will differ from case to case depending upon the nature of the violation. For example, if an employer is found to have discharged an employee for his union activity, PERC can order the employer to reinstate the employee to his former position with full back pay.⁴⁵ If a union illegally fined an employee, PERC could order that the fine be returned. The agency also may order the offending party to post an official notice which states that it has violated the law and that it is applying the remedy ordered by PERC.

The issue of whether PERC will order parties to pay interest on back pay or other monies (such as illegally-held union dues) is still pending.⁴⁶

When a certain violation does not lend itself to monetary payment or personnel action, PERC will simply issue a written order perhaps with a notice. Primarily, this will occur when either the employer or union has been found to have bargained in bad faith. In this case, PERC's order will state that the union or employer should refrain from violating the law and bargain in good faith in the future. This would also be contained in an official notice to be posted by the offending party. It has long been held by the courts in the United States that neither they nor agencies such as PERC may order one side or the other to make specific concessions during bargaining.

"Mootness" of Charges

On occasion a party against whom a charge is filed will argue that the dispute has been settled and that, therefore,

45.

PERC has stated that even if it has made a finding that a discharge was made, in part, to retaliate against union activities, a remedy of reinstatement may not be required. This would be true "when the evidence also indicates that the employee's performance would have justified dismissal." *North Warren Regional Board of Education*, PERC No. 79-9, 4 NJPER 4187.

46.

Board of Education of the Township of Cherry Hill, PERC No. 79-71, 5 NJPER 10102.

PERC should dismiss the unfair practice charge. The New Jersey Supreme Court has affirmed PERC's view that C.123 gave it authority not only to order affirmative actions (such as back pay or reinstatement) but to order that such activity not occur in the future in order to prevent unfair practices.⁴⁷ If the affirmative actions ordered by PERC (such as back pay or reinstatement) have been carried out prior to a final PERC decision, the PERC order might not direct those actions but it will contain an order that the party against whom the charge is filed refrain from such illegal activity in the future.

UNFAIR PRACTICE PROCEDURES

Who May File a Charge?

Under the rules and regulations of the Commission, any public employer, public employee, public employee organization, or their representatives may file a charge with the Commission.

How is a Charge Filed?

1. Charges may be filed by completing forms which can be obtained from the Commission's office.

2. The charge must be signed by the person filing the charge.

3. This charge must be sworn to before a person authorized in New Jersey to administer oaths, usually a Notary Public, or must contain the following statement:

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4. The charging party must include its full name, address and telephone number.

5. The charging party must include the full name, address and telephone number of the party against whom the charge is filed.

6. The charge must include a statement of which sections

⁴⁷.

Galloway Township Board of Education, 78 NJ 1, August, 1978.

the charging party claims to have been violated and the facts upon which the charge is based.⁴⁸

7. The charging party must file an original and four copies with the Commission. The charging party must also serve a copy on the party against whom the charge was filed and be able to prove that it did so. Normally, this can be done by mailing the charge by certified mail, return receipt requested.

At What Time May a Charge Be Filed?

Section 5.4(c) requires that PERC issue no complaint based upon any unfair practice occurring more than six months prior to the filing of a charge unless the charging party was prevented from filing the charge. Normally this means that any charge alleging that an action violated C.123 must have been filed within six months of that action or it will be dismissed. For example, PERC has dismissed a union charge that the employer illegally changed a seniority system.⁴⁹ PERC found that the employer's changes occurred more than six months before the charge was filed.

The filing of a grievance cannot be used by a charging party as a valid reason for not having filed a charge within six months of the action.⁵⁰

In only one case has there been a finding that a charging party was "prevented" from filing a charge within six months.⁵¹ In that matter, a charging party filed a court case and learned through the legal proceeding that the proper forum was PERC. The case arose during the first year after the passage of C.123. It is believed that this decision will affect few, if any, other cases.

48.

Some practices are violations of two or more sections of Chapter 123. Employers and unions can both violate the law at the same time by actions they take jointly. For these reasons, boards considering filing a charge against a union should consider whether an action may violate other parts of the law. At the same time, boards must be careful, especially in contracts, not to agree with the union to violate the law.

49.

State of New Jersey, PERC No. 77-14, 2 NJPER 308.

50.

Bergen County Board of Freeholders, D.U.P. No. 77-4, 3 NJPER 93.

51.

New Jersey Turnpike Authority, 77 NJ 329, August, 1978.

What Happens To A Charge

1. Processing

As with any labor relations agency, PERC is most interested in the speedy resolution of problems by the parties themselves, if at all possible. Therefore, before engaging in extensive hearings, PERC will attempt to first clarify the positions of the parties and to then explore the possibility of the resolution of the underlying dispute.

After the charge is filed, a member of the PERC staff will normally be assigned to process the case. This staff member may request each party to supply a written position on the charge and may also ask the parties to submit written legal briefs on the issues. Normally, the staff member will ask the parties to attend an *exploratory conference* to find out what the issues are in the case and to try to work out a settlement. The staff member may also share information concerning past PERC decisions in order to allow the parties to make reasonable assessments of the possible outcomes of their case. In most cases, an *exploratory conference* will be held between three and five weeks after a charge has been filed. If the charging party does not wish to withdraw its charge, the Director of Unfair Practices and Representation must decide whether the case meets PERC standards for the issuance of a *complaint* or whether it should be *dismissed*.

2. Complaint Or Dismissal

If there is no settlement of the case and the Commission agrees that the allegations, if true, *may* constitute an unfair practice, the Commission will issue a *complaint* against the party charged with violating the law.

A complaint informs the parties which sections of the law are alleged to have been violated, when and where the hearing is to be held and who will act as the hearing officer. All this means is that there *might* be a violation of law and PERC will hold a hearing to determine this. Because the standards for issuance of a complaint are so liberal, its mere issuance gives no real indication of whether the respondent has violated the law.

If the Commission does not agree that the allegations may constitute a violation of the law, it will *dismiss* the charge. The case is then closed.

You should remember that PERC never *investigates* the unfair practice charges filed.

3. *Deferral Of Charges*

Because some charges which allege a violation of C.123 may also involve the interpretation or enforcement of labor contracts, PERC has adopted a procedure whereby it defers, or holds in abeyance, processing of an unfair practice charge until a final arbitration award is issued.

PERC will defer to an arbitration hearing and decision if the underlying issue or issues alleged in the unfair practice charge can be resolved through arbitration.⁵² A second criterion which must be present is that the grievance be subject to binding, not merely advisory arbitration.⁵³

4. *Answer To Complaint*

The party who receives the complaint (the respondent) must file an *answer* within ten days. This answer admits, denies or explains each of the charging party's allegations. If these are not denied or explained, PERC considers them admitted. It is vital that the answer be prepared properly. Perhaps by now you would agree that it is wise to employ your board attorney or a labor relations consultant when faced with an unfair practice charge.

5. *Pre-Hearing Conference*

In most cases, a hearing examiner will meet with the parties to prepare for the hearing. The hearing examiner will attempt to have the parties agree on as many facts as possible in order to shorten and simplify the hearing. He will also assess the length of time the hearing will take, the number of witnesses for either party and the nature of the evidence to be presented.

52.

State of New Jersey, PERC No. 77-31, 3 NJPER 62.

53.

Passaic Township Board of Education, PERC No. 78-42, 4 NJPER 4035.

The hearing examiner may also make one more effort to have the parties settle the matter without a hearing.

6. *The Hearing*

A hearing examiner will hear the case. It is the responsibility of the charging party to prove its case. In one matter, the failure of the charging party to appear at the hearing resulted in a dismissal of the charge.⁵⁴

The hearing examiner has the duty to conduct the hearing in an equitable fashion but has no obligation to assist either party in presenting their case or in soliciting certain information which may not have been raised during the hearing.⁵⁵

Parties in a hearing have a right to counsel, to present evidence, to examine and cross-examine witnesses and to submit written briefs. Subpoenas may be issued to require individuals to testify or to produce records.

7. *Briefs*

Either party may file a brief after the hearing summarizing its positions and supporting them with legal citations.

8. *Hearing Examiner's Recommended Report And Decision*

The hearing examiner then writes a report which states what he or she finds the facts to be and what action is recommended to be taken by the Commission based upon his or her reading of the law.

9. *Oral Argument*

The Rules of the Commission provide that either party may request to present its arguments orally to the full Commission. There is no right to such an opportunity. There is no formula for oral argument. Both parties are given ample time to present positions and the Commissioners often question the parties' representatives at length on various points.

54.

Housing Authority of the City of Newark, PERC No. 77-7, 2 NJPER 184.

55.

Township of Ewing, PERC No. 78-52, 4 NJPER 4055.

10. *The Decision By PERC*

If one party or the other does not formally file *exceptions* to the report, the Commission will usually accept it as their own. (*Exceptions* are written objections to parts or all of a hearing examiner's report by one party or the other.) If either or both parties do file exceptions, briefs may be filed with PERC and the Commission will then issue a decision. That decision may dismiss the entire charge, find some of the charge to be true or find all of the charge to be true. If PERC finds a violation of law, it will issue an order directing certain actions be taken by the respondent (see "Remedies" section earlier in this chapter). As with other decisions of PERC, one party or the other may file an appeal with the courts of the State.

4

The Scope of Negotiations

Background

As stated in the preceding chapter on "Unfair Practices," the parties to collective negotiations are obligated to meet at reasonable times and negotiate in good faith with regard to terms and conditions of employment. The definition of "terms and conditions," therefore, is critical to understanding the extent of the bargaining obligation.

Required Topics of Negotiations

In August of 1978, the New Jersey Supreme Court, in a case involving the *Ridgefield Park Board of Education*,¹ ruled that there are only two categories of subjects in public employment negotiations—mandatorily negotiable terms and conditions of employment (required topics of bargaining) and non-negotiable matters of governmental policy (illegal topics of bargaining).*

The Court reiterated the position it had taken five years earlier in the *Dunellen Trilogy*² that negotiations are limited to terms and conditions of employment, defined as:

*An annual update of topics deemed required or illegal subjects of negotiations can be found in *Negotiations*, published each September by the NJSBA.

1. *Ridgefield Park Board of Education v. Ridgefield Park Education Association*, 78 NJ 144 (1978), 4 NJPER 4164. The Court's analysis refers to all sectors of public employment except public fire departments and public police departments. Chapter 85, Laws of 1977 N.J.S.A. 34:13A-16(f)(4), provides compulsory interest arbitration for these employees, and states that interest arbitration shall be limited to required topics of negotiations, "except that the parties may agree to submit one or more permissive topics of negotiations." Because *Ridgefield Park* did not concern police and fire departments, PERC continues to rule that permissive topics are legally, but not mandatorily, negotiable in the police and fire sector. See *State of New Jersey and State Troopers NCO Association of New Jersey*, PERC No. 79-68, 5 NJPER 10089.

2. *Board of Education of the City of Englewood v. Englewood Teachers Association*, 84 NJ 1; *Burlington County College Faculty Association v. Board of Trustees, Burlington County College*, 84 NJ 10; *Dunellen Board of Education v. Dunellen Education Association*, 84 NJ 17 (1973).

matters that intimately and directly affect the work and welfare of public employees

and

on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

All matters brought to the negotiations table must be examined according to this two factor test. If a matter does not intimately and directly affect employees' work and welfare, e.g., a student grievance procedure, it cannot meet the first test, and is non-negotiable.

If a matter *does* intimately and directly affect the work and welfare of employees, one must apply the second test: would a negotiated agreement on the matter significantly interfere with managerial prerogatives related to the determination of governmental policy?

In the *Ridgefield Park* case, for example, the matter before the Court concerned the board's decision to transfer certain teachers to different classes and buildings. The Court noted that transferring a teacher could have an appreciable effect on the teacher's welfare; but held that aspect of the decision to transfer *insignificant* compared to the school board's managerial duty to assign its employees in the manner it considered most likely to provide all students in the district with a "thorough and efficient education."³

Required topics of negotiations include what the Supreme Court described as the "essential components of terms and conditions of employment"⁴: working hours, compensation, physical facilities and customary fringe benefits.

Regarding working hours, for example, the following topics have been ruled to be required topics of negotiations: the length of the lunch period above the minimum established by

3. See *Robinson v. Cahill*, 62 NJ 473 (1973).

4. *State of New Jersey v. State Supervisory Employees Association*, 78 NJ 54 (1978); 4 NJPER 4165, wherein the Court refers to its 1973 decision, *Board of Education of the City of Englewood v. Englewood Teachers Association*, 64 NJ 1.

N.J.A.C. 6:3-1.15,⁵ the length of the workday,⁶ the amount of unassigned time during the workday,⁷ the length of the work year for public school employees above 180 days,⁸ the scheduling of employee vacations for public school employees if their work year exceeds 180 days,⁹ the decision to reduce the work year from 12 to 10 months,¹⁰ and various kinds of leave with or without pay.¹¹

Compensation includes, in addition to basic salary, income such as severance pay,¹² tuition reimbursement,¹³ and shift differential.

Physical facilities include such things as air conditioned employee lounges with pay telephones, off-street parking, and preparation areas with individual desks and chairs for each teacher in the building.¹⁴

Customary fringe benefits include items that provide things of monetary value at reduced or no cost to the employee; insurance to cover the cost of medical bills, prescriptions, eyeglasses and dental work falls here.¹⁵

The New Jersey Supreme Court, in its *Bernards Township* decision of March 1979, interpreted the PERC law to provide that a grievance procedure to cover complaints over "the applicability of managerial prerogatives to individual employ-

5. Board of Education of the Township of Willingboro, PERC No. 78-20, 3 NJPER 369.

6. Galloway Township Board of Education, PERC No. 77-3, 2 NJPER 254.

7. Clinton Township Board of Education, PERC No. 78-45, 4 NJPER 4038.

8. Edison Township Board of Education, PERC No. 78-53, 4 NJPER 4070.

9. Ibid.

10. Piscataway Township Board of Education and Piscataway Township Principals Association, 164 N.J. Super 98, 5 NJPER 10002.

11. Cliffside Park Board of Education, PERC No. 77-2, 2 NJPER 252.

12. Montville Township Board of Education, PERC No. 76-51, 2 NJPER 230.

13. Salem Community College, PERC No. 78-22, 3 NJPER 375.

14. Byram Township Board of Education and Byram Township Education Association, 152 N.J. Super 12, 3 NJPER 265.

15. Township of Hillside, PERC No. 78-59, 4 NJPER 4076.

ees" was a required topic of negotiations.¹⁶ Grievances over such management decisions, however, could not be brought to *binding arbitration*, because that would severely interfere in managerial rights. These kinds of grievances could go no further than *advisory arbitration*.

In *Bernards Township*, the Court held that the decision to withhold the salary increment of a teacher was an educational policy decision, made in an effort to improve the quality of the education system, and thus concerned an *illegal* topic for negotiations. The Court said the parties could negotiate a grievance procedure to hear complaints over withholding of increments, but such a procedure could not include binding arbitration as a terminal step.

Procedures Related To Management Decisions

Management decisions on educational or governmental policy are not required topics of bargaining (see "Illegal Topics of Bargaining," below). PERC has held, however, that the *procedures* to be used in making certain managerial decisions that intimately and directly affect employees' work and welfare are required topics.

Thus the *procedures* to be used in the evaluation of non-tenured teachers,¹⁷ the non-renewal of non-tenured teachers when not related to a reduction in force,¹⁸ the promotion of employees,¹⁹ or the selection of employees for extra-curricular duties,²⁰ have been found by PERC to be required topics of bargaining.

The Supreme Court in *Ridgefield Park* did not clearly address the negotiability of procedures related to managerial

16.

Bernards Township Board of Education v. Bernards Township Education Association, 79 NJ 311 (1979), 5 NJPER 10083.

17.

Point Pleasant Beach Board of Education, PERC No. 78-43, 4 NJPER 4036.

18.

Bridgewater-Raritan Board of Education, PERC No. 77-21, 3 NJPER 23.

19.

City of Plainfield, PERC No. 76-42, 2 NJPER 168.

20.

Pascack Valley Regional High School District Board of Education, PERC No. 77-55, 3 NJPER 114.

decisions affecting employees. This will likely be resolved through future court decisions.

Statutes, Regulations And Negotiations

The Supreme Court further defined the scope of required negotiations by ruling that no negotiated agreement may contravene any *specific statute or regulation on terms and conditions of employment*. However, where the employer has *broad statutory power* to establish terms and conditions, negotiations must occur upon the demand of the majority representative of the employees over those terms and conditions.²¹

The Court's guidelines on the employer's obligation to negotiate within its legal authority are as follows:

Where a statute or regulation sets a minimum regarding a term and condition of employment, the employer must negotiate over a demand to set a benefit level higher than that minimum. If the statute or regulation sets a maximum, the benefit level to be established up to that maximum is a required topic. If both maximum and minimum benefit levels are specified, the parties must negotiate between those two points.

In no case can the negotiated agreement contravene the minimum or maximum set by statute or regulation. Nor can a term or condition of employment set at an absolute benefit level by statute or regulation be modified through negotiations.

It must be emphasized that this applies only to statutes and regulations setting "terms and conditions of employment" as that phase is defined in *Ridgefield Park*. Statutes and regulations on matters not meeting the two factor test described in *Ridgefield Park* may never be subject to negotiations.

"Impact" Bargaining

PERC has held that the employer must negotiate over the

²¹.
State of New Jersey v. State Supervisory Employees Association, 78 NJ 54, 4 NJPER 4165.

impact of its managerial decisions upon employees' terms and conditions of employment, even though the decisions in themselves are not negotiable.²² PERC believes that this approach creates no greater bargaining obligation upon the employer than exists under the traditional duty to bargain in good faith. The employer has the freedom to make any educational or managerial decisions it deems appropriate to fulfill its obligations to the public; if, however, the implementation of those decisions would change terms and conditions of employment, the employer must negotiate upon demand with the majority representative before implementing those changes.

PERC ruled, for example, that the decision to increase class size is an educational policy decision not subject to negotiations; but the impact, if any, of that decision upon teacher workload is mandatorily negotiable.²³ Regarding reductions in force of teaching staff, PERC held that the decision to RIF, the selection of which non-tenured teachers would be laid-off, and the decision to reemploy any of those teachers at some future time, were non-negotiable matters.²⁴ But the increased workload of the remaining teachers, if any, was mandatorily negotiable,²⁵ as was severance pay for laid-off teachers,²⁶ reinstatement of accumulated sick leave benefits and credit toward sabbatical leave upon recall,²⁷ and the right to placement on the salary guide at the salary received prior to layoff upon recall.²⁸

A key scope of negotiations question unanswered at this time is whether, under *Ridgefield Park*, the impact upon terms and conditions of employment of a non-negotiable topic is in fact a required subject for bargaining. This issue has not

22.

Byram Township Board of Education, PERC No. 76-27, 2 NJPER 143.

23.

Rutgers, the State University, PERC No. 76-13, 2 NJPER 13.

24.

Maywood Board of Education, PERC No. 78-23, 3 NJPER 377.

25.

Board of Trustees of Middlesex County College, PERC No. 78-25, 3 NJPER 383.

26.

Montville Township Board of Education, PERC No. 76-51, 2 NJPER 230.

27.

Cinnaminson Township Board of Education, PERC No. 78-46, 4 NJPER 4039.

28.

Ibid.

been addressed by the Supreme Court. PERC believes that the Appellate Division has sanctioned the "decision/impact" theory,²⁹ and will continue to apply it until ordered otherwise by the courts.

One Appellate Court decision, however, clearly challenged the "impact" theory of negotiations. In *Maywood Board of Education*, the court found that impact bargaining is premised on the existence of a "permissive" category of bargainable topics.³⁰ Since the Supreme Court in *Ridgefield Park* found that there were no such permissive topics of bargaining (see below), the Appellate Court reversed PERC's order to negotiate the impact of a reduction in force (RIF) upon the terms and conditions of employment of remaining teachers.

The Supreme Court denied the union's request for review of this case, meaning that it stands as the law of the land. Another Appellate Court decision, also involving RIFs, came to the same conclusion as the *Maywood* decision, holding that the entire area of RIF, including procedural matters and the impact upon retained employees' terms and conditions, is not legally negotiable.³¹

It is likely that PERC will read *Maywood* narrowly, applying it only to RIF, until there is Supreme Court review of this issue, or until it suffers further reversals at the Appellate Court level.

Illegal Topics Of Negotiations

There are two major categories of matters that have been deemed "illegal topics of negotiations" under the PERC law. Matters which do not meet the two factor test defined in *Ridgefield Park* (see above) are not terms and conditions of

29.

See *Warren Hills Regional Board of Education and Warren Hills Regional Education Association*, PERC No. 78-69, 4 NJPER 4094, wherein PERC interprets the Appellate Division decision in *Byram Township Board of Education and Byram Township Education Association*, 152 N.J. Super 12, to uphold PERC's "decision/impact" theory.

30.

Maywood Board of Education and Maywood Education Association, 168 N.J. Super 45 (1979), 5 NJPER 10093.

31.

Cinnaminson Township Board of Education and Cinnaminson Teachers Association, ___ N.J. Super ___ (June 1, 1979).

employment within the meaning of Chapter 123, and cannot be negotiated or arbitrated. Such matters constitute what PERC formerly defined as the "permissive" category of negotiable topics; under *Ridgefield Park*, such topics are non-negotiable, and negotiated agreements on these topics are invalid and unenforceable.

The other category of illegal topics has been alluded to earlier. Public sector negotiations take place in the context of dozens of State statutes and regulations on terms and conditions of employment. The scope of negotiations is limited to matters *not preempted* by these statutes and regulations.

"Permissive" Topics Are Illegal

A matter can be deemed not to be a term and condition of employment, and thus non-negotiable, if it fails either part of the two factor test. The example of a student grievance procedure, which fails the test because it does not meet the first factor of intimately and directly affecting employees' work and welfare, was noted above. Other examples include student testing, and minutes of pupil contact time (as opposed to minutes of teacher supervisory time) per week.³²

More often, a matter is considered not to be a term and condition of employment because, although it does directly affect employees' welfare, on balance it must be deemed a matter of educational policy or managerial prerogative and therefore non-negotiable. A board of education's *decision* to assign, transfer, renew or promote an employee are all matters of major educational policy and thus are not terms and conditions of employment. As noted above, the decision to withhold a teacher's salary increment has been defined as an essential managerial prerogative which cannot be bargained away.³³ The *criteria* which a board uses to evaluate³⁴ or promote³⁵ an employee are also educational policy matters

³²

Board of Trustees of Middlesex County College, PERC No. 78-13, 4 NJPER 4023.

³³

Bernards Township Board of Education, *op. cit.*

³⁴

Teaneck Board of Education and Teaneck Teachers Association, 161 N.J. Super 75.

³⁵

City of Plainfield, PERC No. 78-42, 2 NJPER 168.

and thus non-negotiable. PERC has held that the decision to assign teachers to supervisory duties such as bus duty, corridor duty, and lunchroom duty,³⁶ is a matter of educational policy. Reassigning a teacher from a writing conference to a teaching period is likewise non-negotiable,³⁷ as is changing a teacher from a familiar class to one not previously taught.³⁸

But PERC also has held, relying on its interpretation of the Appellate Division decision in *Byram Township*, that a board must negotiate over a decision to reassign a teacher from a non-teaching duty period to a classroom teaching period.³⁹ This interpretation of *Byram Township* by PERC may be the subject of litigation, particularly in light of *Ridgefield Park*.

In decisions analogous to the determination that class size is non-negotiable, but the impact upon workload is a required topic, PERC has held that the number of employees a public employer has on staff is a non-negotiable management prerogative; however, employee safety questions arising from a reduction in the number of firefighters manning a piece of fire equipment are required topics.⁴⁰ PERC has further ruled in another case involving uniformed municipal employees that work hours and work schedules are required topics for negotiations; these negotiations, however, must take place within the framework of the employer's manning decisions, i.e. the managerial determination as to how many police officers will work on the various shifts, a determination which is non-negotiable.⁴¹

Statutes And Regulations May Not Be Violated

The second major area of illegal topics concerns statutes and

36.

Byram Township Board of Education, PERC No. 76-27, 2 *NJPER* 143.

37.

North Plainfield Board of Education, PERC No. 76-16, 2 *NJPER* 49.

38.

Piscataway Township Board of Education, PERC No. 77-20, 3 *NJPER* 35.

39.

See footnote 9 (s) in *Maywood Board of Education*, PERC No. 78-23, 3 *NJPER* 337; *Buena Regional Board of Education*, PERC No. 79-63, 5 *NJPER* 10072.

40.

Newark Firemen's Union of New Jersey and City of Newark, PERC No. 76-40, 2 *NJPER* 139.

41.

City of Northfield, PERC No. 78-82, 4 *NJPER* 4125.

regulations on terms and conditions of employment. As stated above, no negotiated agreement can contravene a statute or regulation on a term and condition of employment; one which does so is invalid and unenforceable.

In a decision involving the *State of New Jersey*,⁴² a companion case to *Ridgefield Park*, the Supreme Court looked at a variety of demands brought to the public employer by its supervisory employees union and determined their negotiability in the following manner: first, each issue was examined to see if it was a term and condition of employment according to the two factor test in *Ridgefield Park*; if it was a term and condition, then the Court looked to see if there was a statute or regulation which precluded negotiations, or which set minimum or maximum benefit levels that would limit the range of legal settlement.

The key principle in the Court's ruling was that the public employer has an obligation to negotiate over terms and conditions of employment that are within his authority to establish for the employees in that bargaining unit. The public employer may never negotiate over terms and conditions that have been established by some other legal authority. Any law passed by the Legislature, therefore, automatically preempts negotiations on that topic. Any rule or regulation of the Civil Service Commission similarly preempts negotiations in units of state, county and municipal government to which it applies. Likewise, rules and regulations of the State Board of Education on terms and conditions of employment serve to limit or preempt negotiations at the school district level on those topics. Such rules must be adopted pursuant to the statutory authority of the administrative agency.

The Court further ruled that where an administrative agency such as the Civil Service Commission or the State Board of Education had the statutory authority to promulgate rules setting terms and conditions of employment, and had not done so, a public employer would be obligated to negotiate upon demand regarding those terms and conditions. If the administrative agency later exercised its authority and set

42.

State of New Jersey v. State Supervisory Employees Association, 78 NJ 54, (1978), 4 NJPER 4165.

benefit levels regarding those terms and conditions, these rules and regulations would preempt any contrary provisions in negotiated contracts.

There exists dozens of statutory benefits in public education which set minimum, maximum or absolute benefit levels and which cannot be abrogated through negotiations. Title 18A:30-1, for example, mandates that every steadily employed school employee be permitted to receive at least ten days sick leave with pay per year. This establishes a *minimum* benefit—and negotiations are limited to increasing annual sick leave to eleven or more days; an agreement to provide less than ten days per employee per year would be illegal and unenforceable. Title 18A:30-6 establishes a *maximum* benefit of 15 sick leave days that can be accumulated per year; negotiations up to 15 days accumulation are mandatory, but agreement to permit employees to accumulate more than 15 days sick leave per year would be illegal. All teachers are entitled to observe certain public holidays, without loss of pay; as these are designated by the Legislature, any agreement to deny employees their pay because they observed these days would be illegal.

PERC recently ruled that the procedures for tenured teacher evaluation that are established in *N.J.A.C. 6:3-1.21* are binding on all local boards of education and hence may not be subject to negotiations.⁴³ PERC's ruling specified that *additional procedures* for evaluating tenured teachers which are over and above those specified in the Administrative Code, and *which are not in conflict with any part of the Code*, are required topics for negotiations.

PERC Establishes Some Non-Negotiable Benefits

There are a number of statutory terms and conditions of employment, non-negotiable under the *State of New Jersey* decision, which are derived from the PERC law. Two of them concern the grievance procedure.

One part of Section 5.3 of the Act mandates that every negotiated agreement permit grievances over *alleged misin-*

⁴³.

Bethlehem Township Board of Education, PERC No. 80-5, 5 NJPER 10159.

terpretations, misapplications, or violations of policies, agreements, and administrative decisions affecting terms and conditions of employment. The Supreme Court interpreted this to also cover grievances over statutes and regulations setting terms and conditions. As this broad right to grieve is a statutory right, it cannot be contravened by negotiated agreement, and thus the definition of what is grievable has been standardized for all contracts negotiated under Chapter 123.⁴⁴ The Court stressed, however, that other aspects of grievance procedures remained negotiable. The number of steps in the procedure, timelines for filing grievances, different terminal steps in the procedure for different kinds of grievances, and the use of grievance arbitration for some, all or no grievances, must be established through negotiations.

The Court also found that the relevant language of Section 5.3 which standardized contractual grievability also intended that negotiated grievance procedures "supplant" and "supercede" statutory grievance procedures. Thus, statutory grievance procedures are the one term and condition of public employment set by statute or regulation which can be contravened by negotiated agreement, because the Legislature specifically stated so in Chapter 123.⁴⁵ Employers and unions can agree to incorporate statutory grievance procedures into their agreements, thus retaining their vitality for alleged violations of statutes or regulations; but unless they expressly agree to do so, these statutory procedures will not be available to employees alleging violations, misinterpretations or misapplications of their terms and conditions of employment set by statute or regulation. This preemption by the negotiated grievance procedure of statutory grievance procedures only applies, however, to terms and conditions; disputes over matters not meeting the two factor test in *Ridgefield Park* must still be pursued through statutory dispute channels.

The Supreme Court ruled in another decision that employ-

44.

Township of West Windsor v. PERC and P.B.A. Local #130, 78 NJ 98 (1978), 4 NJPER 4168.

45.

See footnote 6 in *State of New Jersey*, op. cit.

46.

Red Bank Regional High School Board of Education v. Red Bank Regional Education Association, 78 NJ 122 (1978), 4 NJPER 4167.

ees represented by a union holding majority representative status have a statutory right to have the union initiate grievances on their behalf, rather than having to file their grievance personally. As a statutory right this cannot be negotiated away, and a collective bargaining agreement that limits the filing of grievances to individual employees is invalid and unenforceable. This right, like the definition of what may be grieved, applies only to the first step of the grievance procedure.

The PERC law also grants to public employees the right to form, join, and assist any employee organization or to refrain from such activity, a right which has been interpreted to prohibit the negotiation of an agency shop⁴⁷ or maintenance of membership clause.⁴⁸ An agency shop clause mandates that non-members pay a fee to the union as their share of the costs of negotiating and administering the agreement. A maintenance of membership clause mandates that employees who voluntarily join the union must remain dues-paying members for a certain period of time, usually for the duration of the contract.

The statutory right to collectively negotiate through a representative of your own choosing has been held to prohibit "parity" clauses, wherein an employer agrees to grant to one unit whatever benefits it agrees to with another unit. Parity clauses are considered interference in the other unit's ability to negotiate the best possible benefit package for itself.⁴⁹

Two other specific rights granted to employees under the PERC law can be considered terms and conditions of employment which cannot be abrogated through negotiations. The law states that the PERC law may not be construed to deprive employees of their rights under Civil Service laws or regulations, a principle which has been extended to all public employees by the *State of New Jersey* decision.

The law also provides that, where no majority represen-

47.

New Jersey Turnpike Employees Union, Local 194 v. New Jersey Turnpike Authority, 123 N.J. Super 461.

48.

Holmdel Township, PERC No. 78-58, 4 NJPER 4075.

49.

City of Plainfield, PERC No. 78-87, 4 NJPER 4130.

tative exists, an employee may present his grievances to his employer personally or through a representative or organization of which he is a member and have such grievances adjusted.

Of course, no other section of the PERC law may be contravened through negotiations. For a thorough discussion of the obligations and rights granted by this statute, see Chapter 2 on "Unfair Practices."

SCOPE OF NEGOTIATIONS PROCEDURES

PERC Authority On Scope of Negotiations Disputes

The Public Employment Relations Commission has the authority to make determinations on whether an item is within the required scope of negotiations. This authority is outlined in Section 5.4(d) of the Act, as amended by Chapter 123.

PERC has "primary jurisdiction" to make scope determinations. If there is a dispute as to the negotiability of a particular topic, the parties should bring the matter to PERC for an initial determination. No court has the authority to make this initial decision. However, PERC's scope decisions are appealable to the Appellate Division of the Superior Court.

The courts will defer to PERC's scope determinations, as long as PERC adheres to the guidelines set out in *Ridgefield Park* and *State Supervisory Employees Association*. This is the normal practice when courts review decisions by administrative agencies which are within the agencies' area of expertise.

Likewise, a court which receives a request by a public employer or employee organization to rule on the negotiability of a topic in dispute should transfer the matter to PERC for an initial determination by the Commission.

Where the matter in dispute is presently a subject on the negotiations table, PERC has the authority to order the employer to negotiate in good faith regarding the matter if it is a required topic, or to order the union to cease demanding negotiations on the matter if it concerns an illegal topic for bargaining; see Chapter 3, "Unfair Practices."

PERC has the authority to issue an injunction against the arbitration of a matter outside the legal scope of negotiations. For a detailed discussion of the relationship between PERC and the courts regarding injunctions, see Chapter 5, "Injunctive Relief."

When To File A Scope Determination

Disputes over the scope of negotiations generally arise either in negotiations for a new contract or during the period of contract administration.

During negotiations, disputes arise when one party, traditionally the employer, contends that a demand brought to the bargaining table, or a clause in the existing contract, concerns an illegal topic of bargaining as defined in the *Ridgefield Park* and *State Supervisory Employees* cases. The dispute can come before PERC through two avenues:

1. The employer or the union, or both parties acting jointly, petition PERC for a determination on whether a particular item is a required or illegal topic of bargaining.
2. One party can refuse to bargain over the topic in dispute, precipitating an unfair practice charge by the other party; the determination of whether or not there has been a violation of the Act will turn on whether the item in dispute is within the required scope of negotiations.

The preferable method is to file a scope petition, individually or jointly. Scope proceedings are considerably faster than unfair practice proceedings. They are not adversarial in nature, i.e. no questions of guilt or innocence arise. Rather, the question of the legal negotiability of the item in dispute is raised and answered in the abstract. Most scope determinations are based on written briefs only, eliminating the costly and sometimes aggravating process of hearings, examination and cross-examination of witnesses, etc.

Scope petitions also help to remove the items in dispute from the bargaining table quickly. The parties can continue their negotiations on other items while awaiting the scope determination from PERC, or can agree to cease negotiations during this period. Because scope decisions are issued faster

than unfair practice decisions, they provide a minimal interference in the bargaining process.

Scope disputes also arise after negotiations have ended and a contract has been reached. During this period of contract administration, scope questions can arise in a number of ways:

1. The employer and/or the union can file a scope petition regarding a grievance that has been filed, if the employer is alleging that the contract clause involved in the grievance concerns an illegal topic of negotiations. If it does concern an illegal topic, then the clause is invalid and unenforceable, and the grievance may not proceed through the grievance procedure.
2. The employer, individually or with the union, can file a petition with PERC requesting an advisory opinion on the legality of certain clauses in the contract. PERC has stated that, while it does not normally have the authority to render advisory scope decisions (where there is only a potential as opposed to actual controversy), it will do so under "special circumstances." This appears limited to the situation where the party filing the petition has made a *prima facie* ("at first appearance") showing that, a) a particular clause has been declared to be an illegal topic of negotiations by a Commission or judicial decision, or b) specific legislation mandates the conclusion that a particular contract provision is an illegal subject for negotiations.⁵⁰
3. The employer can violate the clause, inviting an unfair practice charge by the union. This approach suffers the same disadvantages as a willful refusal to negotiate, described above. A further danger is that the union may file a grievance and pursue it to arbitration. The employer then faces a dilemma: if it participates in the arbitration proceeding and loses, either on the facts of the case or on any negotiability arguments raised, it must then go to PERC to seek a vacation of the award if it believes the award to concern an illegal topic of bargaining; this means double litigation. If the employer refuses to participate in the arbitration proceeding, and eventually loses in a PERC

50.

Cinnaminson Township Board of Education, PERC No. 78-11, 3 NJPER 323.

scope determination, management will have waived its rights to argue its case on the merits at the arbitration hearing.

It is in the interests of both parties to have mid-contract negotiability disputes settled expeditiously in a non-adversarial proceeding whenever possible. For information on PERC's role in enjoining arbitration following a scope decision finding a matter to be non-negotiable and non-arbitrable, see Chapter 5, "Injunctive Relief."

The Purpose Of The Procedure

PERC authority to make scope decisions is exercised in a very limited fashion. The rules adopted by the agency provide, at *N.J.A.C. 19:13-1.1*:

With respect to the negotiability of a matter sought to be processed pursuant to a collectively negotiated grievance/arbitration procedure, the Commission will *not* determine whether that matter is within the arbitration clause of an agreement, whether a contract provides a defense for the employer's alleged action, whether there is a valid arbitration clause in an agreement, or any other similar question. (Emphasis supplied.)

The Commission will merely answer, "in the abstract," whether the matter sought to be grieved or arbitrated is within the legal scope of negotiations. Likewise, when a party asks PERC to rule on the negotiability of matters then the subject of demands at the bargaining table, PERC will address the matter "in the abstract."

How To File A Scope Petition

The full procedures for filing a scope of negotiations petition are detailed in the New Jersey Administrative Code, at *N.J.A.C. 19:13-1.1 et seq.*

A scope of negotiations petition can be filed by a public employer, by a union which has been recognized or certified as the exclusive representative of the employees in a bargaining unit, or by both parties through a joint petition.

The party filing the petition should present an original and four copies to the Commission, with proof of service of a copy of the petition to the other party if it is not a joint petition. The petition should include the following information:

- a. the full name, address and telephone number of the employer who is a party to the collective negotiations relationship;
- b. the same information regarding the recognized or certified union that is party to the negotiations relationship;
- c. a "clear and concise statement of the matter or matters in dispute", including a statement of the facts under which the dispute arose;
- d. a statement that the dispute arose: i. during the course of collective negotiations, and that one party is seeking to negotiate over a matter or matters which the other party contends are not required subjects of negotiations; ii. regarding the negotiability of a matter which one party seeks to process through the negotiated grievance procedure; or iii. other than the above, with an explanation of the circumstances.

Informal Conferences

In keeping with its goal of resolving disputes voluntarily and expeditiously, PERC will frequently hold an informal conference regarding a scope petition, to clarify the issues in dispute, explore the possibilities for voluntary settlement, or to establish a record of stipulated (not disputed) facts.

While the issues in dispute concern demands presently on the bargaining table, either union demands for changes in the agreement, or management demands for deletion based on the illegality of the contract clauses, an informal conference usually should focus solely on the actual demands the parties have raised during negotiations. The PERC representative will discuss the state of the law, pointing out where there is clear precedent indicating that an item is legal or illegal. This usually results in a withdrawal of the illegal items from the negotiations table.

Sometimes the party who is informed that a particular

demand is illegal may request the PERC representative to give his or her opinion on the legality of one or more hypothetical revised versions of the demand. If the other party to the informal conference does not object, the PERC representative may render his opinion on the hypothetical demand. If the other party does object, however, the PERC representative should restrict his or her comments to the actual items contained in the scope of negotiations petition, because they are the only "matters in dispute" within the meaning of the Act, and refuse to comment on the hypotheticals. In no case should the PERC representative offer hypotheticals of his or her own, without the consent of both parties.

If the item in dispute is one which one party is attempting to process through a negotiated grievance procedure, the informal conference may proceed somewhat differently. If the union is informed by the PERC representative that the grievance involved appears to concern an illegal topic of negotiations, the union may present a revised grievance statement which rephrases the matter to bring it within the legal scope of negotiations. The PERC representative will probably treat this revised grievance as a bona fide "matter in dispute" and speak to its legality or illegality. Such a substitute grievance is not considered a "hypothetical", as is the case with revised bargaining demands that in fact have never been presented in negotiations.⁵¹ As stated above regarding bargaining demands, the PERC representative should never offer his or her own hypothetical revisions of the grievance in order to bring it within the legal scope of negotiations.

What Happens To A Scope Petition

1. Briefs

Whenever possible, the party filing the scope petition should simultaneously file its brief (an original and nine copies) with proof of service of a copy of the brief upon the other party. The party filing the petition, however, has a right

51.

The PERC representative will not consider whether such a revision in the grievance violates the contractual grievance procedure, e.g., time limits, as that is a matter for the parties and the arbitrator to decide.

to file its brief, with copies and proof of service, within 14 days from the date of filing the petition.

The other party must file its brief with nine copies and proof of service to the other party, within 14 days of receiving the petitioner's brief.

The party filing the petition then has 7 days to file an original and nine copies of a reply brief along with proof of service. No other briefs can be filed without the permission of the Commission.

Requests for extensions of time for filing briefs may be granted in the discretion of the Commission. Requests should be in writing, and set forth the reasons for the request and the position of the other party regarding the request.

2. Hearings.

If either party desires a hearing, it may request one no later than five days after filing its initial brief. The purpose of such a hearing is to litigate "substantial and material disputed factual issues." Because most scope petitions address only legal issues, i.e. whether the matter in dispute is a required topic of negotiations, evidentiary hearings in scope matters are very rare.

When a hearing is held, it is conducted before a hearing examiner, who receives documentary evidence and testimony, and then prepares a report which contains findings of fact, conclusions of law, and recommendations to the Commission as to the final decision.

3. Oral Argument.

Either party may request oral argument within 7 days after service of the responding party's brief. Such oral argument may be granted by the Commission in its discretion. It is most unlikely that oral argument will be granted if an evidentiary hearing has been held. If there is no evidentiary hearing, the Commission is more likely to grant oral argument.

4. The Decision.

PERC reviews the briefs of the parties, the evidentiary record developed at a hearing if one has been held, and the

objections, if any, the parties made (called "exceptions") to the hearing examiner's report if one was written. PERC then issues a decision containing its findings of fact and conclusions of law. If the parties to the dispute include police officers or firefighters, the Commission determines if the matter in dispute is a required, permissive, or illegal topic. If the parties involve only other kinds of public employees including all school district employees, then PERC's decision will be limited to a determination that the matter is a required or illegal topic.

Injunctive Relief

Background

For many years, parties who had cases before government agencies could request that the agency ask a court to issue a *temporary restraining order* or *interlocutory injunction*. The effect of the order would be to stop one party from doing something which generally could not be undone later. The order would stop the party from taking any action until a hearing or decision could be rendered by the appropriate agency. For example, an individual claiming to own a building about to be torn down by someone else might ask that a court issue an injunction against destroying the building until it could be determined who actually owned it.

Unlike other government agencies which must go to court to obtain a restraining order, PERC and the Appellate Division of the Superior Court have determined that under Chapter 123, PERC has the authority to issue restraining orders and injunctions on its own behalf. PERC has done so in several cases involving both unfair practices and scope determinations.

Unfair Practice Cases

PERC has set a standard for the issuance of injunctions as established in a number of cases. Determinations will be made on a case-by-case basis and only in the most clear and compelling circumstances.

First, it must be shown that the action of the party would cause "irreparable harm," so that the normal order which PERC would issue after finding that an unfair practice has occurred would not be sufficient to correct the violation of the

law. The following two cases highlight situations where PERC found that interim relief was necessary to avoid irreparable harm to one of the parties.

In one case, the union claimed that the public employer (a municipality) was about to subcontract out all the work performed by bargaining unit members.¹ The employees' union had just been certified as the majority representative and the employer had refused to negotiate during its appeal to the Appellate Division regarding the certification. PERC ordered the employer not to subcontract while the union's unfair practice charge was being processed, in order to preserve the bargaining unit. PERC reasoned that if the union had to wait until a final decision on whether the employer had violated the law, there might not even be a bargaining unit left.

In another case, the board of education failed to pay increments to secretaries and custodians after the contract had expired and while negotiating a new agreement. In this instance, PERC believed that the board's unilateral action in the non-payment of salary increments undercut the negotiations process and the ability of the majority representative to effectively represent its members. PERC viewed the board's action as pressure on the association to accept the board's proposals in order to receive the increments, which were in fact due to the teachers under the old agreement. PERC felt this action had such a chilling effect on the negotiations process that traditional monetary awards that would be awarded at the conclusion of the case would not effectively remedy the violation of the Act.²

The second standard for granting interim relief involves a determination by PERC that the charging party has a "substantial likelihood of success" in proving a violation of the law at a hearing of the Commission. This standard makes it additionally difficult for a charging party to receive an injunction while its charge is being processed by PERC.

The following case illustrates the importance of this stan-

1. Township of Stafford, PERC No. 76-9, 1 NJPER 54.

2. Union County Regional High School Board of Education, PERC No. 78-27, 4 NJPER 4007.

dard in interim relief cases. The school board unilaterally implemented a reorganization of administrative responsibilities, which resulted in certain teachers being elevated to supervisory rank and consequently removed from the teacher negotiating unit. The union filed a refusal to bargain charge, arguing that the board's reorganization decision itself was negotiable, and requested an injunction against the implementation of the reorganization decision until the full case was decided. PERC denied the injunction because, based on previous PERC and court decisions, it appeared the board was within its legal rights to make and implement the reorganization. Because the union didn't have a "substantial likelihood of success" on the merits of the case, no injunction was issued.³

All requests for injunctions are evaluated according to this two factor standard. For example, another situation in which the employee organization failed to meet the standards necessary for interim relief involved an action by a municipality in which it unilaterally increased the work week of certain unit members.⁴ In this instance the city had been engaged in negotiations with the employee organization and had gone through mediation, factfinding and post factfinding negotiations before it imposed the change in hours. PERC believed that the union had failed to show that the employer had necessarily engaged in bad faith negotiations by its unilateral action at that point in bargaining. Furthermore, no irreparable harm was shown because the alleged unfair practice could be remedied by a monetary award following a regular Commission hearing.

It is clear that PERC will issue very few temporary restraining orders under these standards. While this seems to be understood by the parties, they may, at times, use the process to achieve ends other than relief from an illegal action. In a paper presented by the Executive Director of PERC, he noted, "in perhaps as many as half of the cases, the charging party has requested interim relief (an injunction) knowing that the request will not be granted but as a means of receiving almost

3.

Freehold Regional High School Board of Education, PERC No. 78-29, 4 *NJPER* 4010.

4.

City of Jersey City, PERC No. 77-13, 2 *NJPER* 293.

immediate attention and action regarding the handling of the charge."⁵

Scope of Negotiations Cases

PERC initially held that it would not grant interim relief in scope cases. It held that the elements present in unfair practice charges that require interim relief be granted were absent in scope proceedings. The Appellate Division rejected PERC's arguments and held that PERC has the power to issue injunctions in both scope and unfair practice proceedings.⁶

As with unfair cases, PERC has established a standard for issuing injunctions in scope cases. PERC will issue an injunction if "there is any reasonable basis for the contention of the requesting party that the matter(s) in dispute may be found not to be within the scope of collective negotiations and therefore not arbitrable."⁷

It is apparent when viewing this standard that most scope interim relief proceedings center around questions of arbitrability. The employer will request that PERC issue an injunction delaying the arbitration hearing until a decision can be made on whether the matter is negotiable and, therefore, arbitrable. Using this standard, PERC will deny an injunction restraining arbitration if the disputed matter is a term and condition of employment and clearly negotiable as defined in *Ridgefield Park*.⁸ As a result of *Ridgefield Park* and the elimination of the permissive category of negotiable topics, the number of requests for restraint of arbitration has increased as PERC finds itself making numerous scope determinations in the previous permissive area. In most such cases, the parties agree informally to postpone arbitration, and no injunction ever issues.

5. "Interim Relief in New Jersey," by Jeffrey Tener, prepared for the Third Annual Meeting of the Society of Professionals in Dispute Resolution, Los Angeles, California, October 13, 1975, p. 23.

6. *Board of Education of the City of Englewood v. Englewood Teachers Association*, 135 N.J. Super 120, 1 NJPER 34.

7.

The Board of Education of Borough of Tenafly, E.D. No. 92, 1 NJPER 50.

8.

Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 NJ 144 (1978). See Chapter 4, "The Scope of Negotiations."

PERC's jurisdiction regarding restraint of arbitration only extends to whether the matter is within the scope of negotiations. The issue of contractual arbitrability, that is, whether the parties have agreed to arbitrate the matter within their collective bargaining agreement, is left to the courts. Thus, even if the matter is negotiable, the parties can have arbitration restrained if the parties have, within their agreement, specifically excluded the matter from arbitration. If the issue involves questions of negotiability and contractual arbitrability, the correct procedure would be to go first to PERC for a scope determination. If the matter was found to be within the scope of negotiability, the parties would proceed to court for a ruling on contractual arbitrability. If the court ruled that the parties did agree to arbitrate the matter, the issue would proceed to arbitration. This procedure, wherein PERC has primary jurisdiction in scope questions, and the courts retain their authority in questions of contractual arbitrability, has been sanctioned by the New Jersey Supreme Court.⁹

Injunctive Relief Procedures

The procedures for seeking injunctive relief are the same in both unfair practice and scope cases and are found in *N.J.A.C. 19:14-9.1 et seq.*

The charging party in an unfair practice case, or either of the parties in a scope case, can apply to the Commission for an order requiring the other party to show cause why specified interim relief should not be granted pending the final decision of the Commission on the issue in dispute. This request for injunctive relief can take place at the filing of the unfair practice charge or petition for a scope of negotiations determination, or at any other point pending a final Commission decision.¹⁰

The application for interim relief or order to show cause should state the remedy sought and the facts of the case. The party filing could request an immediate restraining order at

9.

Ibid.

10.

For information regarding the filing of appropriate papers and the timelines involved, contact your board attorney.

the time of the filing, if they could show there is a likelihood of success on the merits and that immediate or irreparable damage will result before a hearing on the matter could take place. This is rarely provided. In most situations, the application for interim relief is made to the Chairman or the Special Assistant, and a hearing is scheduled. Briefs are filed, and on the date indicated on the show cause order the parties go before PERC and have an informal hearing as to why a temporary restraint should be issued, dissolved, modified, or continued. The parties may present oral arguments along with any written briefs.

The decision by the Chairman or other individual designated by the Commission is in writing and states the reasons for granting or denying the restraining order or injunction. The decision is final on behalf of the Commission on the issue of interim relief. The decision, however, may be appealed by either party to the Appellate Division of New Jersey's Superior Court.

Although PERC has the authority to issue injunctions on its own behalf, it has no power to force the parties to comply with its decision. However, PERC has the power to apply to the Appellate Division of the Superior Court for an order to enforce its decision.

6

Impasse Procedures

Background

Public employees in New Jersey do not have the right to strike. C.123 provides alternate ways of reaching a settlement when direct negotiations reach an impasse, either for an initial contract or for a successor agreement. PERC's rules state:

In the event that a public employer and certified or recognized employee representative have failed to reach a settlement through direct negotiations, either the public employer, the employee representative, or the parties jointly may notify the Director of Impasses, in writing, of the existence of an impasse and request the appointment of a mediator.¹

In addition to mediation, factfinding is also available to help the parties reach a voluntary settlement. In crisis situations, PERC may appoint a conciliator or super-mediator. Certain public employees (police, firefighters) have another impasse procedure available—interest arbitration.

Definitions

Impasse--An impasse in negotiations is reached when further meetings at the table will not bring out any concessions or progress. "*True impasse*" goes beyond this definition. True impasse, also known as *genuine impasse*, refers to a point in negotiations where the parties have utilized all the available impasse procedures and have continued to negotiate with still no settlement reached.

Mediation--Mediation is a process where a third party

1.
N.J.A.C. 19:12-3.1.

neutral steps into negotiations to help the parties reach a settlement after the parties have reached an impasse.

Factfinding—Factfinding is a procedure that is applied when mediation has failed. By presenting arguments and information, the parties try to support their positions. The factfinder considers these presentations and renders a report and recommendation for settlement.

Conciliation—This process is very similar to mediation, except that it occurs after post-factfinding negotiations have failed to bring about a settlement. Conciliators are usually appointed by PERC during crisis (strike) situations.

Interest Arbitration—This is a binding method of settling negotiations disputes where a third party actually writes the parties' contract. Regarding all economic items, the arbitrator chooses either the employer's last position or the union's last position; for non-economic items, the arbitrator may choose from among the separate positions of the parties and construct a package settlement. It is mandatory for police and fire departments, and available for other parties.

Grievance Arbitration—This procedure is used to settle disputes arising out of the interpretation, application or violation of terms and conditions of employment that have already been negotiated or set by a contract, board policy or administrative decision. This procedure is a negotiable matter.

Mediation

When

When the parties to negotiations have met many times and are still not able to conclude negotiations on some items, either party or both parties together may declare an impasse by petitioning PERC for a mediator. This should be done by completing a "Notice of Impasse" form describing the negotiations problems. A copy of this form should be sent to the other party if the petition is not submitted jointly.

How

Once PERC receives the "Notice of Impasse," it will de-

termine whether mediation is proper. Occasionally, one party may declare an impasse prematurely, without giving direct negotiations an opportunity to bring the parties to a settlement. If PERC is satisfied that an impasse has been reached, a mediator will be appointed.

Who

PERC employs a staff of 8 mediators that are assigned to negotiations disputes, as well as a list of *ad hoc* neutrals. The *ad hoc* neutrals are assigned when the staff mediators are unavailable. If the parties do not jointly request a mediator, PERC will assign a neutral who is available and who, PERC feels, will be able to help the parties reach an agreement. If PERC appoints a mediator that either party has a strong objection to, that party should notify PERC of the reasons for the objection and request that another neutral be appointed to mediate the dispute.

What & How

The mediator's role is to help the parties move closer together in order to bring about a settlement. A mediator has no authority or power to force either party to make a concession, nor is he concerned with what is fair. His sole function is to assist and guide the parties toward a compromise that they can live with.

He will act as an intermediary, a note carrier, or as a catalyst, depending upon how the parties want to use the neutral.

A mediator may bring the parties together initially in order to introduce himself and to clarify the issues that are in dispute. The parties may be asked to describe their positions on each of the items and provide documentation where the mediator so requests. After a joint meeting, the mediator will probably find it productive to work with each side separately, to persuade, cajole, and attempt to determine where he can get an agreement on a particular issue.

Mediators should respect the information the parties provide as confidential. To be most effective, the mediator should have the trust of the parties and do nothing to jeopardize the confidences of the parties. Under no circumstances should the

mediator disclose to the other party your final position, unless you have given your permission.

How Much

The costs of the mediator for his services and expenses are borne by PERC.

Factfinding

If the mediator is not able to help bring about a settlement, the mediator, in his confidential report to PERC, may recommend that PERC appoint a factfinder to help resolve the impasse. The parties may also request that PERC appoint a factfinder since mediation has failed. Like mediation, the request for factfinding is made by completing a form "Request for Invoking of Factfinding With Recommendations for Settlement."

The Appointment

With factfinding, the parties have more input into the selection process. PERC will submit to the parties a list of 3 names: one name may be crossed off and the other two ranked in order of preference. PERC will appoint a factfinder consistent with the parties' selections. Or the parties may jointly request that a particular neutral be appointed as factfinder; in some cases the parties may wish to use the neutral that mediated the dispute. PERC will attempt to accommodate the wishes of the parties but is not bound to comply with this request.

The Process

The factfinder, once appointed, may attempt to mediate the dispute in order to reach a settlement, unless the parties are opposed to such attempts. If the factfinder's mediatory attempts are not successful, the neutral will conduct the actual factfinding session. A factfinder will make recommendations for a settlement; however, the recommendations are advisory and are not binding on either party. The goal of a factfinder is to help the parties reach a settlement; his recommendations, even if not accepted, should form a basis for renewed negotiations and eventual settlement.

A factfinding hearing is a quasi-judicial investigation into the remaining issues in dispute. Held in private unless both parties desire a public forum, the factfinder will hear the arguments that support each party's position. In addition, the factfinder will consider statistics and documentation that substantiate the parties' claims regarding, for example, "inability to pay" and "comparability."

The factfinder has authority to subpoena witnesses and compel their attendance, administer oaths, take sworn testimony, cross-examine witnesses, and require the production of any materials before him. Most factfinders, however, conduct informal hearings and do not use these powers. If necessary, however, these powers are available.

Factfinders must analyze and interpret the statistical and other substantiating evidence that the parties submit to support their position. Although C.123 does not mandate that the factfinder use specific criteria when interpreting this information, factfinders normally use the following guidelines.

1. *Comparability*—The factfinder will look at the wages, hours and benefits of similar employees in neighboring, similar school districts. If the board uses this argument, it should be careful to present data for positions that are truly similar—same qualifications, duties, and experience.

2. *Ability to pay*—The factfinder will consider the district's cap, equalized valuation per pupil, per capita wage, etc. The Board should develop this information as simply and clearly as possible.

3. *District's negotiating history and experience*—The factfinder will not normally recommend a "ground breaking" benefit. For example, where there exists no formal grievance procedure, it is unlikely the factfinder will recommend binding grievance arbitration for all disputes. Neither will he usually recommend eliminating a benefit already enjoyed by employees.

The Results

The factfinder, if he has not gotten a settlement prior to the end of the hearing, must issue his report of findings of fact and recommendations for settlement. These are not binding, but only advisory. Each party will receive a copy of the report

along with PERC, and the parties must meet within five days to decide whether to accept, reject, or modify the factfinder's report. Even when the parties formally reject the factfinder's report, it may serve as a basis for continued negotiations.

If the parties do not accept the recommendations of the factfinder, there exists no finality to the bargaining process except the agreement to a contract. Negotiations will continue until a settlement is reached.

Costs

The costs of factfinders (\$200 per day and expenses) must be shared by the parties.

Conciliation

In some crisis situations, another neutral may be appointed by PERC as a "super-mediator" or conciliator. This person will be very knowledgeable of the negotiations process and will have a great deal of mediation experience, especially in strike situations. He will act much like the mediator first assigned to the impasse, but may take the initiative in making creative suggestions for settlement. Other tactics include:

1. calling meetings and requesting the two parties to attend where they have been unwilling to earlier;
2. requesting written clarification of the "crisis issues" and justification for the positions;
3. getting the parties talking on matters of "principle";
4. helping to draft a tentative agreement on issues in dispute.

The costs of conciliation are normally borne by the parties, however, if the conciliator is a PERC staff member, PERC will absorb the costs.

True Impasse

After mediation, factfinding and post-factfinding negotiations have occurred, the parties may have reached a "true impasse." At this time, the public employer does have legal authority to implement its last offer on all terms and condi-

tions of employment.² All issues, not just one or two, must be implemented. "Implementation" is extremely rare, and while legally it may be achieved if true impasse occurs, practically, a whole host of problems can result. It would be far more desirable for both the present and future for the parties to reach an agreement mutually.

Single Issue Impasse

When an employer makes an educational policy decision that affects an employee's terms and conditions of employment, the employer must negotiate the impact of its policy decision, upon demand, with the majority representative. Should an impasse be reached over a single issue of "impact," the parties may contact PERC for the assignment of a mediator. In the past, PERC has supplied neutrals on single issue impasse disputes. It is not clear whether they will or are able to assign mediators in all such cases.

Interest Arbitration

Police and fire negotiations in New Jersey have a process for providing finality in the bargaining process. Even without resorting to mediation and factfinding, unions representing police officers or firefighters may petition PERC to appoint an interest arbitrator who will make a binding resolution of all outstanding issues in dispute.

When considering economic items, the interest arbitrator must choose between the employer's last offer, as a package, and the union's last offer, as a package. On non-economic items, the interest arbitrator must choose on an item-by-item basis. The parties are free, however, to choose from other systems of binding arbitration set out in the Act, or to construct their own with the approval of PERC.

In interest arbitration the parties do not voluntarily or mutually reach an agreement. A third party interest arbitrator actually *writes* the parties' contract for them.

The process is available for parties other than police and fire

²

See Chapter 2, "Unfair Practices".

who desire to use it, as long as both the employer and employee organization so desire. It is very rare, however, in teacher-board negotiations.

PERC's Resources

PERC employs a staff of 8 full-time mediators who are available for assignment in impasse situations. Last year, they and PERC's *ad hoc* panel of mediators and factfinders were assigned to 600 disputes. Staff mediators are not assigned as factfinders unless both parties so request. Instead, the approximately 150 disputes that went to factfinding were handled by the 100 *ad hoc* members on PERC's panel of mediators and factfinders.

This panel consists of neutrals who have met PERC's criteria and standards of competence, acceptability and impartiality. Candidates for the panel are judged on the basis of their education, experience, knowledge and reputation in the field of labor relations. Many members of PERC's *ad hoc* panel are either professional neutrals, college professors, or attorneys. The professional neutrals may be active in mediation or arbitration under the jurisdiction of other agencies or organizations such as: The American Arbitration Association (AAA), Federal Mediation and Conciliation Service (FMCS), New Jersey State Board of Mediation or other state agencies. Most neutrals are members of the Society of Professionals in Dispute Resolution (SPIDR), which has a very stringent code of ethics.

When confronted with a mediator or list of factfinders that is unfamiliar, a board may request that PERC supply background material on the neutral and a list of those districts where the neutral has recently served as a mediator or factfinder. A board may then call these districts to receive input on the neutral's style, attitude, method, etc.³

3.

The NJSBA also supplies information on mediators, factfinders and arbitrators who practice in public education in New Jersey.

Appendix

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

As Amended by C.123, P.L. 1974 and
C.85, P.L. 1977

New Jersey Statutes Annotated
Title 34, Sections 34:13A-1 to 34:13A-21

(References to the application of this statute to private sector labor
relations are deleted.)

34:13A-1 Short Title.

This Act shall be known and may be cited as the "New
Jersey Employer-Employee Relations Act."

34:13A-2 Declaration of Policy.

It is hereby declared as the public policy of this State that
the best interests of the people of the State are served by the
prevention or prompt settlement of labor disputes, both in the
private and public sectors; that strikes, lockouts, work stop-
pages and other forms of employer and employee strife,
regardless where the merits of the controversy lie, are forces

productive ultimately of economic and public waste; that the interests and rights of the consumers and the people of the State, while not direct parties therein, should always be considered, respected and protected; and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this Act is hereby declared as a matter of legislative determination.

34:13A-3 Definitions.

When used in this Act:

(b) The term "commission" shall mean New Jersey Public Employment Relations Commission.

(c) The term "employer" includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

(d) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in

the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

(e) The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organizations serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them.

(f) "Managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

(g) "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

34:13A-5.1

Establishment of Division of Public Employment Relations and Division of Private Employment Dispute Settlement.

There is hereby established a Division of Public Em-

ployment Relations and a Division of Private Employment Dispute Settlement.

(a) The Division of Public Employment Relations shall be concerned exclusively with matters of public employment related to determining negotiating units, elections, certifications and settlement of public employee representative and public employer disputes and grievance procedures. For the purpose of complying with the provisions of Article V., Section VI, paragraph 1 of the New Jersey Constitution, the Division of Public Employment Relations is hereby allocated within the Department of Labor and Industry, and located in the city of Trenton, but notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any board or officer thereof.

34:13A-5.2

Public Employment Relations Commission; Powers and Duties; Members; Terms; Compensation.

There is hereby established in the Division of Public Employment Relations a commission to be known as the New Jersey Public Employment Relations Commission. This commission, in addition to the powers and duties granted by this Act, shall have in the public employment area the same powers and duties granted to the labor mediation board in sections 7 and 10 of chapter 100, P.L. 1941 and in sections 2 and 3 of chapter 32, P.L. 1945. This commission shall make policy and establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including enforcement of statutory provisions concerning representative elections and related matters and to implement fully all the provisions of this Act. The commission shall consist of 7 members to be appointed by the Governor, by and with the advice and consent of the Senate. Of such members, 2 shall be representative of public employers, 2 shall be representative of public employee organizations and 3 shall be representative of the public including the appointee who is designated as chairman. Of the first appointees, 2 shall be

appointed for 2 years, 2 for a term of 3 years and 3, including the chairman, for a term of 4 years. Their successors shall be appointed for terms of 3 years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant.

The members of the commission, other than the chairman, shall be compensated at the rate of \$100.00 for each 6 hour day spent in attendance at meetings and consultations and shall be reimbursed for necessary expenses in connection with the discharge of their duties except that no commission member who receives a salary or other form of compensation as a representative of any employer or employee group, organization or association, shall be compensated by the commission for any deliberations directly involving members of said employer or employee group, organization or association. Compensation for more, or less than, 6 hours per day, shall be prorated in proportion to the time involved.

The chairman of the commission shall be its chief executive officer and administrator, shall devote his full time to the performance of his duties as chairman of the Public Employment Relations Commission and shall receive such compensation as shall be provided by law.

The term of the member of the commission who is designated as chairman on the date of enactment of this Act shall expire on the effective date of this Act.

34:13A-5.3

Employee Organizations; Right to Form, or Join; Collective Negotiations.

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, except in a school district the term managerial executive shall mean the

superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this Act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiations with the majority representative; and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

34:13A-5.4

Prohibited Practices; Commission Proceedings.

a. Employers, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

(2) Dominating or interfering with the formation, existence or administration of any employee organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(7) Violating any of the rules and regulations established by the commission.

b. Employee organizations, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.

(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(5) Violating any of the rules and regulations established by the commission.

c. The commission shall have exclusive power as herein-after provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served

upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the date he was no longer so prevented.

In any such proceeding, the provisions of the Administrative Procedure Act P.L. 1968, C.410 (C.52:14B-1 et seq.) shall be applicable. Evidence shall be taken at the hearing and filed with the commission. If, upon all the evidence taken, the commission shall determine that any party charged has engaged or is engaging in any such unfair practice, the commission shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this Act. All cases in which a complaint and notice of hearing on a charge is actually issued by the commission, shall be prosecuted before the commission or its agent, or both, by the representative of the employee organization or party filing the charge or his authorized representative.

d. The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

e. The commission shall adopt such rules as may be required to regulate the conduct of representation elections, and to regulate the time of commencement of negotiations and of institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submission dates.

f. The commission shall have the power to apply to the

Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this Act, shall be affirmed and enforced in such proceeding.

34:13A-6 Powers and Duties.

(b) Whenever negotiations between a public employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the commission, through the Division of Public Employment Relations shall, upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse. In the event of a failure to resolve the impasse by mediation the Division of Public Employment Relations is empowered to recommend or invoke factfinding with recommendation for settlement, the cost of which shall be borne by the commission.

(c) The board in private employment through the Division of Private Employment Dispute Settlement, and the commission in public employment, through the Division of Public Employment Relations, shall take the following steps to avoid or terminate labor disputes: (1) to arrange for, hold, adjourn or reconvene a conference or conferences between the disputants or one or more of their representatives or any of them; (2) to invite the disputants or their representatives or any of them to attend such conference and submit, either orally or in writing, the grievances of and differences between the disputants; (3) to discuss such grievances and differences with the disputants and their representatives; and (4) to assist in negotiating and drafting agreements for the adjustment in settlement of such grievances and differences and for the termination or avoidance, as the case may be, of the existing or threatened labor dispute.

(d) The commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit, or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit. All of the powers and duties conferred or imposed upon the division that are necessary for the administration of this subdivision, and non-inconsistent with it, are to that extent hereby made applicable. Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

(e) For the purposes of this section, the Division of Public Employment Relations shall have the authority and power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum, and to require the production and examination of any governmental or other books or papers relating to any matter described above.

(f) . . . In carrying out any of its work under this Act, the commission may designate one of its members or an officer of the commission to act on its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all of the powers hereby conferred upon the commission in connection with the discharge of the duty or duties so delegated.

(g) The board and commission may also appoint and designate other persons or groups of persons to act for and on its behalf and may delegate to such persons or groups of persons

any and all of the powers conferred upon it by this Act, so far as it is reasonably necessary to effectuate the purposes of this Act. Such persons shall serve without compensation but shall be reimbursed for any necessary expenses.

(h) The personnel of the Division of Public Employment Relations shall include only individuals familiar with the field of public employee-management relations. The commission's determination that a person is familiar in this field shall not be reviewable by any other body.

34:13A-7 Arbitration.

Whenever a controversy shall arise between an employer and his employees which is not settled either in conference between representatives of the parties or through mediation in the manner provided by this Act, such controversy may, by agreement of the parties, be submitted to arbitration, one person to be selected by the employer, one person to be selected by the employees, and a third selected by the representatives of the employer and employees, and in the event of any such appointment or selection not being made upon the request of the parties in the controversy, the department may select the third person to arbitrate the matter submitted; provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of the policy or purpose of this Act, or of any provision thereof, nor shall failure or refusal to arbitrate constitute a basis for any action at law or suit in equity.

34:13A-8.1 Effect of Act Upon Prior Agreements.

Nothing in this Act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current terms heretofore entered into between any public employer and any employee organization nor shall any provision hereof annul or modify any pension statute or statutes of this State.

34:13A-8.2

Filed Contracts In Public Employment.

The commission shall collect and maintain a current file of filed contracts in public employment. Public employers shall file with the commission a copy of any contracts it has negotiated with public employee representatives following the consummation of negotiations.

34:13A-8.3

Development and Maintenance of Programs.

The commission in conjunction with the Institute of Management and Labor Relations of Rutgers, the State University, shall develop and maintain a program for the guidance of public employees and public employers in employee-management relations, to provide technical advice to public employees and public employers on employee-management programs, to assist in the development of programs for training employee and management personnel in the principles and procedures of consultation, negotiation and settlement of disputes in the public service, and for the training of employee and management officials in the discharge of their employee-management relations responsibilities in the public interest.

34:13A-11

Rules.

The board shall have power to adopt, alter, amend or repeal such rules in connection with the voluntary mediation of labor disputes in private employment and the commission shall have the same powers in public employment, as may be necessary for the proper administration and enforcement of the provisions of this Act.

34:13A-12

Construction.

Nothing contained in this Act shall be construed as interfer-

ing with, impeding or diminishing in any way any right guaranteed by law or by the Constitution of the State or of the United States.

34:13A-13
Separability of Provisions.

If any clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, and the application of such provisions to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this Act would have been adopted had such invalid provisions not been included herein.

34:13A-14
Declaration of Policy Regarding Police and Fire Departments.

It is the public policy of this State that in public fire and police departments, where public employees do not enjoy the right to strike, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

34:13A-15
Definitions of Police and Fire Departments.

"Public fire department" means any department of a municipality, county, fire district or the State or any agency

thereof having employees engaged in firefighting provided that such firefighting employees are included in a negotiating unit exclusively comprised of firefighting employees.

"Public police department" means any police department or organization of a municipality, county or park, or the State, or any agency thereof having employees engaged in performing police services including but not necessarily limited to units composed of State troopers, police officers, detectives and investigators of counties, county parks and park commissions, grades of sheriff's officers and investigators; State motor vehicle officers, inspectors and investigators of the Alcoholic Beverage Commission, conservation officers in Fish, Game and Shell Fisheries, rangers in parks, marine patrolmen; correction officers, keepers, cottage officers, interstate escort officers, juvenile officers in the Department of Corrections and patrolmen of the Human Services and Corrections Departments; patrolmen of Capitol police and patrolmen of the Palisades Interstate Park Commission.

34:13A-16

Impasse Procedures for Police and Fire Departments.

a. Whenever negotiations between a public fire or police department and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the commission, through the Division of Public Employment Relations shall, upon the request of either party, or upon its own motion take such steps including the assignment of a mediator as it may deem expedient to effect a voluntary resolution of the impasse. The cost of mediation shall be borne by the commission.

b. In the event of a failure to resolve the impasse by mediation, the Division of Public Employment Relations, at the request of either party, shall invoke factfinding with recommendation for settlement of all issues in dispute unless the parties reach a voluntary settlement prior to the issuance of the factfinder's report and recommended terms of settlement. Factfindings shall be limited to those issues that are within the required scope of negotiations unless the parties to the factfinding agree to factfinding on permissive subjects of

negotiation. The cost of factfinding shall be borne by the commission. In the event of a continuing failure to resolve an impasse by means of the procedure set forth above, and notwithstanding the fact that such procedures have not been exhausted, the parties shall notify the commission 60 days prior to the required budget submission date of the public employer as to whether or not they have agreed upon a terminal procedure for resolving the issues in dispute. Any terminal procedure mutually agreed upon by the parties shall be reduced to writing, provide for finality in resolving the issues in dispute, and shall be submitted to the commission for approval.

c. Terminal procedures that are approvable include, but shall not be limited to the following:

(1) Conventional arbitration of all unsettled items.

(2) Arbitration under which the award by an arbitrator or panel of arbitrators is confined to a choice between (a) the last offer of the employer and (b) the last offer of the employees' representative, as a single package.

(3) Arbitration under which the award is confined to a choice between (a) the last offer of the employer and (b) the last offer of the employees' representative, on each issue in dispute, with the decision on an issue-by-issue basis.

(4) If there is a factfinder's report with recommendations on the issues in dispute, the parties may agree to arbitration under which the award would be confined to a choice among three positions: (a) the last offer of the employer as a single package, (b) the last offer of the employees' representative as a single package, or (c) the factfinder's recommendations as a single package.

(5) If there is a factfinder's report with a recommendation on each of the issues in dispute, the parties may agree to arbitration under which the award would be confined to a choice, on each issue from among three positions: (a) the last offer of the employer on the issue, (b) the employee representative's last offer on the issue, or (c) the factfinder's recommendation on the issue.

(6) Arbitration under which the award on the economic issues in dispute is confined to a choice between (a) the last offer of the employer on the economic issues as a single

package and (b) the employee representative's last offer on the economic issues as a single package; and, on any noneconomic issues in dispute, the award is confined to a choice between (a) the last offer of the employer on each issue in dispute and (b) the employee representative's last offer on that issue.

d. The following procedure shall be utilized if parties fail to agree on a terminal procedure for the settlement of an impasse dispute:

(1) In the event of a failure of the parties to agree upon an acceptable terminal procedure 50 days prior to the public employer's budget-submission date, no later than the aforesaid time the parties shall separately so notify the commission in writing, indicating all issues in dispute and the reasons for their inability to agree on the procedure. The substance of a written notification shall not provide the basis for any delay in effectuating the provisions of this subsection.

(2) Upon receipt of such notification from either party or on the commission's own motion, the procedure to provide finality for the resolution of issues in dispute shall be binding arbitration under which the award on the economic issues in dispute shall be confined to a choice between: (a) the last offer of the employer on such issues as a single package and (b) the employee representative's last offer, on such issues, as a single package; and on the noneconomic issues in dispute, the award shall be confined to a choice between: (a) the last offer of the employer on each issue in dispute and (b) the employee representative's last offer on such issue.

e. The commission shall take measures to assure the selection of an arbitrator or arbitrators from its special panel of arbitrators. Appointment of an arbitrator to the commission's special panel shall be for a 3-year term, with reappointment contingent upon a screening process similar to that used for determining initial appointments.

f. (1) Prior to the arbitration proceedings, the parties shall submit to the arbitrator or tripartite panel of arbitrators, pursuant to rules and procedures established by the commission, their final offers in two separate parts: (a) a single package containing all the economic issues in dispute and (b) the individual issues in dispute not included in the economic package, each set forth separately by issue.

(2) In the event of a dispute, the commission shall have the power to decide which issues are economic issues. Economic issues include those items which have a direct relation to employee income including wages, salaries, hours in relation to earnings, and other forms of compensation such as paid vacation, paid holidays, health and medical insurance, and other economic benefits to employees.

(3) Throughout formal arbitration proceedings the chosen arbitrator or panel of arbitrators may mediate or assist the parties in reaching a mutually agreeable settlement.

(4) Arbitration shall be limited to those subjects that are within the required scope of collective negotiations, except that the parties may agree to submit to arbitration one or more permissive subjects of negotiation.

(5) The decision of an arbitrator or panel of arbitrators shall include an opinion and an award, which shall be final and binding upon the parties and shall be irreversible; except where there is submitted to the court extrinsic evidence upon which the court may vacate, modify or correct such award pursuant to N.J.S. 2A:24-7 et seq. or for failure to apply the factors specified in subsection g. below.

(6) The parties shall bear the costs of arbitration subject to a fee schedule approved by the commission.

g. The arbitrator or panel of arbitrators shall decide the dispute based on a reasonable determination of the issues, giving due weight to those factors listed below that are judged relevant for the resolution of the specific dispute:

(1) The interests and welfare of the public.

(2) Comparison of the wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees performing the same or similar services and with other employees generally:

(a) In public employment in the same or similar comparable jurisdictions.

(b) In comparable private employment.

(c) In public and private employment in general.

(3) The overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and

hospitalization benefits, and all other economic benefits received.

(4) Stipulations of the parties.

(5) The lawful authority of the employer.

(6) The financial impact on the governing unit, its residents and taxpayers.

(7) The cost of living.

(8) The continuity and stability of employment including seniority rights and such other factors not confined to the foregoing which are ordinarily or traditionally considered in the determination of wages, hours, and conditions of employment through collective negotiations and collective bargaining between the parties in the public service and in private employment.

h. A mediator, factfinder, or arbitrator while functioning in a mediatory capacity shall not be required to disclose any files, records, reports, documents, or other papers classified as confidential received or prepared by him, or to testify with regard to mediation, conducted by him under this Act on behalf of any party to any cause pending in any type of proceeding under this Act. Nothing contained herein shall exempt such an individual from disclosing information relating to the commission of a crime.

34:13A-17

Powers of the Arbitrator.

The arbitrator may administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements and documents as he may deem material to a just determination of the issues in dispute, and for such purpose may issue subpoenas. If any person refuses to obey a subpoena, or refuses to be sworn or to testify, or if any witness, party or attorney is guilty of any contempt while in attendance at any hearing, the arbitrator may, or the Attorney General if requested shall, invoke the aid of the Superior Court within the county in which the hearing is being held, which court shall issue an appropriate order. Any failure to obey the order may be punished by the court as contempt.

34:13A-18

Issues Excluded from Arbitration.

The arbitrator shall not issue any finding, opinion or order regarding the issue of whether or not a public employer shall remain as a participant in the New Jersey State Health Benefits Program or any governmental retirement system or pension fund, or statutory retirement or pension plan; nor, in the case of a participating public employer, shall the arbitrator issue any finding, opinion or order regarding any aspect of the rights, duties, obligations in or associated with the New Jersey State Health Benefits Program or any governmental retirement system or pension fund, or statutory retirement or pension plan.

34:13A-19

Enforcement of the Award.

The decision of the arbitrator may be enforced at the instance of either party in the Superior Court with venue laid in the county in which the dispute arose. The commencement of a new public employer fiscal year after the initiation of arbitration procedures under this Act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitrator or his decision. Increases in rates of compensation awarded by the arbitrator shall take effect on the date of implementation prescribed in the award. The parties, by stipulation, may at any time amend or modify an award of arbitration.

34:13A-20

Court Review of Awards.

Orders of the arbitrator shall be reviewable by the Superior Court in the county in which the dispute arose. The pendency of such proceeding for review shall not of itself stay the order of the arbitrator.

34:13A-21

Maintenance of Status Quo Pending Award.

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

JULY 1, 1976

Effective July 1, 1976, the New Jersey Employer-Employee Relations Act has been amended to read as follows:

"Notwithstanding the provisions of P.L. 1974, C.123, the cost of factfinding shall be borne equally by the public employer and the exclusive employee representative."

(No Statutory assignment number has been given thus far.)